

**SUPREME COURT OF CANADA**

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| **Citation:**  Sharbern Holding Inc. *v*. Vancouver Airport Centre Ltd., 2011 SCC 23, [2011] 2 S.C.R. 175 | **Date:** 20110511**Docket:** 33280 |

**Between:**

**Sharbern Holding Inc.**

Appellant

and

**Vancouver Airport Centre Ltd., Larco Hospitality Management Inc.,**

**MM&R Valuation Services Inc. doing business as HVS International — Canada**

**and HVS International — Canada**

Respondents

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**(paras. 1 to 178)  | Rothstein J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Cromwell JJ. concurring) |

Sharbern Holding Inc. *v.* Vancouver Airport Centre Ltd., 2011 SCC 23, [2011] 2 S.C.R. 175

**Sharbern Holding Inc.** *Appellant*

v.

**Vancouver Airport Centre Ltd., Larco Hospitality Management Inc.,**

**MM&R Valuation Services Inc. doing business as**

**HVS International — Canada and HVS International — Canada Respondents**

**Indexed as:** Sharbern Holding Inc. ***v.*** Vancouver Airport Centre Ltd.

2011 SCC 23

File No.: 33280.

2010: October 6; 2011: May 11.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for british columbia

 *Commercial law — Property — Disclosure statements — Company developing and marketing two hotels on same property — Purchasers of strata units in each hotel entering into differing agreements with developer — Purchasers of Hilton units not informed of different financial arrangements offered to purchasers of Marriott units — Hilton not performing as expected and owners of Hilton units incurring losses — Whether developer liable for misrepresentation under B.C. Real Estate Act for material false statements — Whether developer able to avail itself of statutory defence — Whether deemed reliance under Real Estate Act was rebuttable — Real Estate Act, R.S.B.C. 1996, c. 397, s. 75.*

 *Torts — Negligent misrepresentation — Disclosure statements — Company developing and marketing two hotels on same property — Purchasers of strata units in each hotel entering into differing agreements with developer — Purchasers of Hilton units not informed of different financial arrangements offered to purchasers of Marriott units — Hilton not performing as expected and owners of Hilton units incurring losses — Whether developer liable for negligent misrepresentation under common law.*

 *Fiduciary duty — Agent — Company developing and marketing two hotels on same property — Purchasers of strata units in each hotel entering into differing agreements with developer — Purchasers of Hilton units not informed of different financial arrangements offered to purchasers of Marriott units — Developer entering into non‑competition agreements with owners of Marriott units on behalf of owners of Hilton units without prior consent — Hilton not performing as expected and owners of Hilton units incurring losses — Whether developer owed a fiduciary duty to owners of Hilton units — If so, whether developer was in breach of its fiduciary duty.*

 The respondent developer Vancouver Airport Centre Ltd. (“VAC”) was incorporated for the purpose of developing and marketing two hotels on the same property: a Marriott hotel and a Hilton hotel. The two hotels were essentially identical and were joined by a concourse of shops and other amenities. Purchasers of strata lots in each hotel entered into separate Hotel Asset Management Agreements with VAC. The two hotels were marketed and developed at different times, resulting in differences in the financial arrangements offered to the purchasers of each hotel. VAC offered purchasers in the Marriott hotel a guarantee and VAC was entitled to a monthly management fee of a percentage of the gross rental revenue as well as an incentive management fee. VAC did not offer purchasers in the Hilton hotel a guarantee, and VAC’s monthly management fee for the Hilton was lower than for the Marriott. The Hilton Disclosure Statement did not disclose the differences in financial arrangements as between the Hilton Owners and the Marriott Owners. The Hilton Owners incurred losses.

 S represents a class of investors who purchased strata lots in the Hilton hotel from VAC. S claimed that VAC was liable for failing to disclose details about differences in the financial arrangements given to the Hilton Owners and those given to the Marriott Owners. S alleged that the differences resulted in an undisclosed conflict of interest in that they created an incentive for VAC to favour the Marriott over the Hilton in its operation and management of the two hotels.

 The trial judge concluded that the undisclosed differences in financial arrangements gave rise to at least a potential conflict of interest, particularly in view of the potential for common management of the two hotels. She then concluded that VAC negligently misrepresented both the absence of an actual or potential conflict of interest and the nature of the agreements between VAC and the Marriott Owners and found both misrepresentations material.  While her reasons were not entirely clear, it appears she found VAC liable both under common law and under the *Real Estate Act*. The trial judge concluded that under the *Real Estate Act* the investors were deemed to rely on material misrepresentations by VAC and that such deemed reliance was a non-rebuttable presumption. The trial judge also found that in its capacity as manager, VAC was a fiduciary of the Hilton Owners, that a conflict existed with respect to VAC’s interests as between the Hilton and the Marriott, and that VAC was liable for breach of fiduciary duty because it did not disclose that conflict. She also found that VAC was liable for breach of fiduciary duty as manager.

 The Court of Appeal allowed VAC’s appeal. The appellate court found that the details of the financial arrangements between the two hotels were not material.  As to breach of fiduciary duty, the Court of Appeal determined that there was no breach by VAC.

 *Held*: The appeal should be dismissed.

 Both the *Securities Act* and the *Real Estate Act* governed VAC’s disclosure obligations. VAC’s disclosure obligations were limited to disclosing specific prescribed matters. VAC issued one document that combined the two Acts’ requirements: the Hilton Disclosure Statement.

 S claims that VAC is liable for misrepresentations found in the Hilton Disclosure Statement which resulted in the non‑disclosure of a material conflict of interest leading to two potential causes of action: one under s. 75 of the *Real Estate Act*, and the other at common law under the tort of negligent misrepresentation.

 Under the *Real Estate Act*, a material false statement in a disclosure statement will result in the developer being liable to investors for any resulting loss they may have sustained. However, s. 75 also contains a defence which provides that if the developer had reasonable grounds to believe and did believe that the material false statement was true, it would not be liable.

 A materiality standard is a legislated and regulatory balancing between too much and too little disclosure. The jurisprudence has recognized that it is not in the interests of investors to be buried in trivial information that will impair decision making. The *Real Estate Act* does not define what is meant by the term “material” when it is used in the context of the “material false statement” required for liability under s. 75. Information is material if there is a substantial likelihood that it would have been considered important by a reasonable investor in making his or her decision to invest. In other words, information is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available. Materiality is a question of mixed law and fact, and except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention. In carrying out a materiality assessment, a court must first look at the information disclosed to investors at the time they made their investment decision. The next step is to consider the omitted information against the backdrop of what was disclosed. As part of this second step, a court may consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. Investors’ behaviour evidence is relevant to the materiality assessment. Evidence of common knowledge or, depending upon the circumstances, knowledge specific to particular investors would also be admissible. Nonetheless, in considering the question of materiality, the predominant focus is on the disclosed and omitted information.

 The trial judge erred in law with respect to assessing the materiality of the alleged false statements in three ways. First, once she had determined that the differences in financial arrangements created a potential or actual conflict of interest, she found that there was an obligation to disclose them as if they were inherently material. This approach misinterprets the statutory requirement as well as the test for materiality. While it is true that in certain situations, common sense inferences will be sufficient to establish materiality, in this case, there was evidence to support the opposite inference that the omitted information was not material in the context of what had already been disclosed. Therefore, a more detailed analysis of the evidence constituting the total mix of information was required in order to make a determination about what a reasonable investor would have considered significant.

 Second, the trial judge erred by reversing the burden of proof of materiality from the plaintiff to the defendant. Once the trial judge was satisfied that S had proven the existence of a conflict of interest, she turned to VAC to show why it was not material. The result was that she made the determination that the conflict of interest was material without requiring S to satisfy its burden, as plaintiff, of proving materiality.

 Third, the trial judge erred when she failed to consider all of the evidence relevant to the determination of materiality. Relevant evidence was available concerning the general economic climate at the time the strata lots were sold, the financial arrangements offered to Hilton Owners, the disclosure made by VAC of common management and risk factors, and the limited extent of VAC’s ability to act upon the differences in financial arrangements in its own interests. There was also evidence of the conduct of fully informed investors, either prior to making their investment decisions or subsequent to their investment, when they had learned of the guarantee given to the Marriott Owners. This evidence was relevant to the trial judge’s materiality assessment.

 While S was not required to prove that investors would not have purchased the Hilton strata lots had they known about the differences in financial arrangements, it did have the burden of proving materiality, on a balance of probabilities. S failed to adduce evidence to prove the materiality of the differences in financial arrangements.

 Even if VAC were shown to have made a material false statement, the statutory defence contained in s. 75(2)(b)(viii) of the *Real Estate Act* would preclude VAC from being found liable under s. 75(2). To rely on the defence, VAC had to show that it subjectively believed the representations it made were true and that it objectively had reasonable grounds for such a belief. The statutory defence does not appear to have been considered by the trial judge. Evidence of common industry practices and of VAC’s limited practical means and incentives to prefer the Marriott hotel over the Hilton hotel indicates that VAC subjectively believed, and objectively had reasonable grounds to believe, that it was making true statements when it did not disclose the details of the differences in financial arrangements and represented in the Hilton Disclosure Statement that it had entered into agreements with the Marriott that were similar in form and substance to those governing the Hilton and that it was not aware of any existing or potential conflicts of interest.

 The presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase. While the *Real Estate Act* did not expressly provide for a rebuttable presumption, the use of the word “deemed” does not always result in a conclusive, non‑rebuttable presumption. It is the purpose of the statute that must be examined in order to determine if the presumption is rebuttable.

 VAC is also not liable for the tort of negligent misrepresentation. The trial judge did not consider whether VAC breached the standard of care. S’s failure to demonstrate how VAC breached the standard of care is fatal to its common law claim.

 Although VAC, as manager of the Hilton, had fiduciary obligations to S, S did not discharge its onus of proving a breach of fiduciary duty. The nature and scope of the fiduciary duty owed by VAC must be assessed in the context of the contract giving rise to those duties. When VAC was acting as an issuer, its relationship with S was not fiduciary in nature. However, when VAC began acting as S’s agent under the Hotel Asset Management Agreement, a fiduciary relationship arose. VAC’s position of conflict in managing both the Hilton and the Marriott hotels had already been disclosed to S.

 The disclosure obligations with respect to VAC’s fiduciary duty are different from the disclosure obligations under the *Real Estate Act*. As a fiduciary, VAC was obligated to disclose any material facts or information, such as if there was a substantial risk that VAC’s fiduciary relationship with the Hilton Owners would be materially and adversely affected by VAC’s own interests or by VAC’s duties to another. VAC’s statutory duty was simply to disclose to investors certain prescribed information, without making material false statements. It is also necessary to inquire whether circumstances changed during the course of the fiduciary relationship such as to require VAC to make additional disclosure and obtain renewed consent.

 S did not adduce evidence to establish that the different financial arrangements constituted material facts or information beyond what had already been disclosed by VAC. S also failed to establish the materiality of the non‑competition agreement implemented by VAC to prevent the Hilton and Marriott hotels from undercutting each other’s room rates. The evidence before the trial court could not support a finding that VAC was liable for a breach of fiduciary duty either for failing to disclose the differences in financial arrangements or in implementing the non‑competition policy.

**Cases Cited**

 **Discussed:** *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331; *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), rev’g 512 F.2d 324 (1975); *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; **referred to:** *Sparling* *v. Royal Trustco Ltd.* (1984), 6 D.L.R. (4th) 682, aff’d [1986] 2 S.C.R. 537; *Harris v. Universal Explorations Ltd.* (1982), 17 B.L.R. 135; *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610, 189 B.C.A.C. 251; *Gerstle v. Gamble‑Skogmo, Inc.*, 478 F.2d 1281 (1973); *Mills v. Electric Auto‑Lite Co.*, 396 U.S. 375 (1970); *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *Maple Leaf Foods Inc. v. Schneider Corp.*(1998), 42 O.R. (3d) 177; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *St. Peter’s Evangelical Lutheran Church v. Ottawa*, [1982] 2 S.C.R. 616; *R. v. Loxdale* (1758), 1 Burr. 445, 97 E.R. 394; *Nova, an Alberta Corp. v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *McGuire v. Graham* (1908), 11 O.W.R. 999; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631.

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 Stephen R. Schachter, Q.C., and Geoffrey B. Gomery, for the appellant.

 Peter A. Gall, Q.C., Donald R. Munroe, Q.C., *M.* Ali Lakhani and Edward Iacobucci, for the respondents.

 The judgment of the Court was delivered by

 Rothstein J. —

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I. Introduction

1. When securities are offered to the general public, the rule of *caveat emptor* no longer applies. Securities legislation imposes on issuers a statutory duty of disclosure. That duty may vary in detail from one Act to another or from one jurisdiction to another. However, the common theme is that issuers must disclose to potential investors information affecting their investment decision. Even so, issuers are not subject to an indeterminate obligation, such that an unhappy investor may seize on any trivial or unimportant fact that was not disclosed to render an issuer liable for the investor’s losses. Rather than issuers being required to provide unlimited disclosure, disclosure obligations have been enacted to provide a balance between too much and too little disclosure.
2. The appeal arises from a class action lawsuit in which the appellant, Sharbern Holding Inc. (“Sharbern”), represents a class of investors who purchased strata lots in a Hilton hotel (the “Hilton Owners”) from the respondent developer, Vancouver Airport Centre Ltd. (“VAC”). Sharbern claimed that VAC was liable for failing to disclose details about differences in the financial arrangements given to the Hilton Owners, and those given to purchasers of strata lots in the adjacent Marriott hotel (the “Marriott Owners”) that VAC was developing on the same property. Sharbern alleged that the differences resulted in an undisclosed conflict of interest in that they created an incentive for VAC to favour the Marriott over the Hilton in its operation and management of the two hotels.
3. Two main questions are raised on appeal. The first is whether VAC is liable for alleged misrepresentations contained in the offering memorandum and disclosure statement (the “Hilton Disclosure Statement”) that VAC used to sell the Hilton strata lots. The second is whether VAC is liable for breach of fiduciary duty when it acted as manager of the Hilton under an agreement (the “Hotel Asset Management Agreement”) entered into between VAC and the Hilton Owners, including Sharbern. In the reasons that follow, I conclude that Sharbern’s claims fail on both grounds, and I would dismiss the appeal.
4. As to the first question, I am of the opinion that thetrial judgeerred in law in concludingthat VACisliable for misrepresentation, either under the statutory cause of action found in the *Real Estate Act*, R.S.B.C. 1996, c. 397, or under the common law of negligent misrepresentation.
5. Under s. 75 of the *Real Estate Act*, VAC could only be liable if it is found to have made material false statements to Sharbern, and cannot rely on the defence contained in the section. I am of the respectful view that the trial judge erred in law with respect to the materiality of the alleged false statements. The legal errors were: treating the conflict of interest as inherently material; reversing the burden of proof of materiality from the plaintiff to the defendant; and failing to consider all of the evidence relevant to the determination of materiality. She further erred in not considering the statutory defence which would avail to the benefit of VAC.
6. Although this Court has previously dealt with the issues of materiality and disclosure obligations in the context of securities law, this case represents the first time that the Court has considered the common law test for materiality. Even though the test is not new in Canadian law, this case represents an opportunity to clarify important aspects of the test.
7. Under the common law of negligent misrepresentation, the trial judge erred by not considering whether VAC breached the standard of care. As there is no evidence capable of supporting a finding of breach of standard of care, her finding under the common law of negligent misrepresentation cannot stand.
8. As to the second question, although VAC, as manager of the Hilton, had fiduciary obligations to Sharbern, Sharbern did not discharge its onus of proving a breach of fiduciary duty. A fiduciary is required to disclose material facts and information, and conflicts of interest. VAC’s position of conflict in managing both the Hilton and the Marriott hotels had already been disclosed to Sharbern. The trial judge again failed to consider all the relevant evidence on the issue of materiality that was before her, and Sharbern did not adduce evidence to support a finding that the different financial arrangements constituted material facts or information beyond what had already been disclosed by VAC.

II. Facts

A. *The Hilton and Marriott Hotels*

1. VAC is owned by Larco Investments Ltd. (“Larco Investments”), a company involved in real estate and hotel development. By the mid 1990s, there was an extraordinary boom in the Richmond hotel market. Larco Investments already owned the Best Western Richmond Inn in that market, and decided to develop and market two additional hotels on the same property. It incorporated VAC for that purpose. The Marriott hotel, a strata-titled hotel tower marketed through an offering memorandum and disclosure statement issued September 11, 1996, opened for business in June 1998. A second, identical strata-titled hotel tower was built and marketed through the Hilton Disclosure Statement issued February 3, 1998. It opened as a Hilton hotel in June 1999. The two hotels were essentially identical and were joined by a concourse of shops and other amenities.
2. Purchasers of strata lots in each hotel entered into separate Hotel Asset Management Agreements with VAC, whereby VAC was given exclusive management of the hotel for 20 years, with an option to renew. In return, VAC contracted to, among other things, use commercially reasonable efforts to rent out the strata units, maximize each owner’s proportionate share of monies available for distribution, and faithfully perform its duties and responsibilities and supervise and direct hotel operations.
3. The two strata unit hotels were marketed and developed at different times, resulting in differences in the financial arrangements offered to the purchasers of each hotel. Since the popularity of marketing a strata unit hotel in an urban area solely for the income stream was unknown, VAC offered purchasers in the Marriott hotel a gross operating guarantee. For the first five years of the hotel’s operation, VAC guaranteed a gross return of 12% of the purchase price of the owner’s unit, so that each strata lot owner’s annual proportionate share of funds available for distribution after projected operating expenses and other deductions was a projected net return of 8.29%.
4. Under the Hotel Asset Management Agreement entered into between the Marriott Owners and VAC, VAC was entitled to a monthly management fee of 5% of the gross rental revenue, and an incentive management fee equal to 25% of the amount by which the owners’ net annual return on investment exceeded 8%.
5. VAC’s evidence was that it intended to market the Hilton with a guaranteed rate of return, but was advised by Larco Investments’ securities solicitor that changes to securities regulations precluded making reference to a guarantee in the Hilton Disclosure Statement. Instead, VAC marketed the Hilton on the basis of projections. In an effort to increase the projected return for potential investors of the Hilton strata units, VAC increased the revenue available to them by including food and beverage revenues (which were retained by VAC for the Marriott hotel), decreasing the management fee charged by VAC under the Hotel Asset Management Agreement to 3%, and removing the hotel lobby lease expense.
6. The guaranteed gross return offered to Marriott Owners, and the 5% gross rental revenue and added incentive provided to VAC as its fee for managing the Marriott versus the 3% management fee provided to VAC for managing the Hilton (collectively the “Compensation Differences”), are the differences in the financial arrangements made with purchasers of the two hotels that are the essential focus of Sharbern’s claims on appeal.
7. While the Hilton Disclosure Statement disclosed that VAC owned the Best Western Richmond Inn and that VAC was currently developing the adjacent Marriott hotel, it did not disclose the Compensation Differences as between the Hilton and Marriott Owners.
8. The marketing of the Hilton strata units was not as successful as that of the Marriott, in which all of the units were sold within a few hours. At some point, VAC decided to retain the last 24 Hilton units rather than continue to incur significant marketing costs. Ultimately, neither hotel achieved their anticipated financial performances. By 2001, the Richmond hotel market was one of the weakest hotel markets in Canada. The hotel market was further weakened by the events of September 11, 2001. The Marriott did not achieve a 12% gross return on investment for any of the years covered by the 5-year guarantee. As a result, VAC sustained liability of over $13 million under the guarantee, which was ultimately paid by Larco Investments. The Hilton Owners incurred losses instead of obtaining the projected 16.6% returns. The Hilton did not perform as well as the Marriott.

B. *Procedural Background*

1. On June 16, 2003, Sharbern brought an action against VAC, HVS International — Canada (“HVS”) and Larco Hospitality Management Inc. (formerly known as HMS Hospitality Management Services Ltd. (“HMS”)). HVS was the company that prepared the financial projections for the Hilton hotel that were included in the Hilton Disclosure Statement. HMS was an affiliate of VAC that carried out the day-to-day management of the Hilton hotel, the Marriott hotel and the Best Western Richmond Inn.
2. Sharbern obtained certification of the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, on behalf of approximately 200 unit owners (*Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2005 BCSC 232 (CanLII), aff’d 2006 BCCA 96, 223 B.C.A.C. 80). Twenty-four common issues on liability were certified. The trial judge summarized what she called the “central contentious” common liability issues (2007 BCSC 1262, 38 B.L.R. (4th) 171, at para. 10 and Appendix A), which I paraphrase as:

1. Whether the financial projections made by HVS were negligent misrepresentations, and whether the investment returns projected by VAC in the Hilton Disclosure Statement constituted fraudulent or negligent misrepresentations.

2. Whether VAC’s representations about conflicts of interest and the nature of the financial arrangements as between the Hilton and Marriott hotels were fraudulent or negligent.

3. Whether the members of the Hilton class could be deemed to have relied on any of the impugned representations pursuant to s. 75(2) of the *Real Estate Act* and the effect of the repeal of the *Real Estate Act*.

4. Whether VAC and HMS owed fiduciary and/or trust duties to the members of the Hilton class, and if so, whether they breached those duties.

III. Lower Court Decisions

A. *British Columbia Supreme Court, 2007 BCSC 1262, 38 B.L.R. (4th) 171*

1. Madam Justice Wedge made a number of findings that are not at issue in this appeal. She determined that neither VAC nor HVS were liable for negligent misrepresentation concerning the financial projections. She observed that the allegation of fraud against VAC with respect to the projected investment returns had been withdrawn by Sharbern. She found that HMS did not owe fiduciary duties to Sharbern. In supplemental reasons, she also clarified that VAC was not liable for fraudulent misrepresentation with respect to its conflict of interest representations because Sharbern did not “prove that VAC did not have an honest belief in the representation and either intended to deceive investors or was reckless as to whether it did so” (2008 BCSC 245 (CanLII), at para. 12).
2. With respect to her findings that are at issue in this appeal, Wedge J. concluded that the undisclosed Compensation Differences gave rise to at least a potential conflict of interest, particularly in view of the potential for common management of the two hotels. She then concluded that VAC negligently misrepresented both the absence of an actual or potential conflict of interest and the nature of the agreements between VAC and the Marriott Owners. She found both misrepresentations material. It is not entirely clear from Wedge J.’s reasons whether she found VAC liable under the common law or under the *Real Estate Act*, although I proceed on the basis that she found VAC liable under both.
3. Wedge J. concluded that under the *Real Estate Act*, the investors were deemed to rely on material misrepresentations by VAC. She determined that such deemed reliance was not a rebuttable presumption, irrespective of the actual knowledge of the investors.
4. She also found that in its capacity as manager, VAC was a fiduciary of the Hilton Owners, that a conflict existed with respect to VAC’s interests as between the Hilton and the Marriott, and that VAC was liable for breach of fiduciary duty because it did not disclose that conflict. Finally, she found that VAC was also liable for breach of fiduciary duty as manager, because of a non-competition arrangement that it put in place between the Marriott and the Hilton, preventing each hotel from competing for certain customers with the other or with the Richmond Inn.

B. *British Columbia Court of Appeal, 2009 BCCA 224, 57 B.L.R. (4th) 1*

1. VAC appealed and Sharbern cross-appealed aspects of the trial decision. The Court of Appeal allowed VAC’s appeal, overturning Wedge J.’s findings with respect to misrepresentation, deemed reliance and breach of fiduciary duty. Sharbern’s cross-appeal was dismissed.
2. On the issue of misrepresentation, Chiasson J.A. found that the details of the financial arrangements between the two hotels were not material. He observed that at trial “VAC relied on the extensive factual and expert evidence it adduced concerning actual and industry practice in the management of multiple hotels by a single entity” and that “[t]here was no evidence to the contrary and no evidence objectively to support the conclusion a reasonable investor would be concerned about the details of the financial arrangements” (para. 76). He found that

 [h]aving made the disclosure [VAC] did, recognizing industry and actual practice and considering the subjective belie[f] of [VAC’s officers and employees], VAC did not misrepresent that it was unaware of any conflict that reasonably could affect materially the investment decisions of the Hilton Hotel investors. [para. 84]

He therefore ruled that the trial judge had erred in concluding VAC materially misrepresented its conflict of interest and its agreements with the Marriott Owners.

1. As to breach of fiduciary duty, Chiasson J.A. determined that there was no breach by VAC. He observed that the answer to whether VAC was “obliged to tell the Hilton Hotel unit owners the details of its financial arrangements with the Marriott Hotel unit owners . . . depends on whether that information was material” (para. 98). He went on to conclude that “in the circumstances of this case, the information objectively was not material” (para. 99). In his view, “the consent given to VAC to act for competing hotels is an answer to any contention the implementation of the price competition policy was *per se* a breach of fiduciary duty” (para. 104). The issue was again reduced to the question of whether VAC was required to disclose the details of its financial arrangements with the Marriott. Chiasson J.A. concluded it was not.

IV. Issues

1. This appeal raises five issues, which I will address in turn:

1. Did the trial judge err in finding that VAC was liable under s. 75 of the *Real Estate Act* for material false statements?

2. Did the trial judge err in not considering the statutory defence available to a developer under s. 75(2)(b)(viii) of the *Real Estate Act*, and whether VAC could avail itself of that defence?

3. Did the trial judge err in finding that the deemed reliance under s. 75(2)(a) of the *Real Estate Act* was non-rebuttable?

4. Did the trial judge err in finding that VAC was liable for negligent misrepresentation under the common law?

5. Did the trial judge err in finding VAC liable for breach of fiduciary duty?

V. Analysis

A. *Misrepresentation Under the Real Estate Act*

 (1) VAC’s Statutory Disclosure Obligations

1. I commence with a summary of the statutory disclosure requirements that were applicable in the context of this case.
2. The Hilton hotel strata lotswere a combination of an interest in real estate and an interest in a rental pool, governed by the *Securities Act*, R.S.B.C. 1996, c. 418, and the *Real Estate Act*. Both statutes governed VAC’s disclosure obligations. Pursuant to those obligations, VAC marketed the strata lots using a document that was a combination of both a *Securities Act* “offering memorandum” and a *Real Estate Act* “disclosure statement”.
3. As to VAC’s disclosure obligations under the *Securities Act*, the strata lots were marketed on the basis of exemptions then found in ss. 45(2)(*5*) and 74(2)(*4*) of that Act. Section 45(2)(*5*) provided that VAC did not have to register with the British Columbia Securities Commission to trade in the strata lots. Section 74(2)(*4*) provided that VAC did not have to provide a *Securities Act* prospectus for the strata lots. Both exemptions applied to trades — such as those involving the strata lots — in which a person purchased the security as a principal and the security had an aggregate acquisition cost of not less than a prescribed amount, in this case $97,000.
4. The minimum acquisition cost and the requirementthatthepurchaser be acting as principal imply that these conditions serve as a proxy for a degree of sophistication on the part of the investor, justifying a more defined disclosure obligation than that found under the prospectus requirements. Because the strata lots fell under these *Securities Act* exemptions, VAC was only requiredto submit an offering memorandum (British Columbia Securities Commission, Notice and Interpretation Note No. 96/36, “Real Estate Securities” (online)). VAC’s disclosure obligations under an offering memorandum were limited to disclosing specific matters that were prescribed by the B.C. Securities Commission in a document referred to as Form 43B.
5. As to VAC’s disclosure obligations under the *Real Estate Act*, s. 66(1) of that Act provided that the Superintendent of Real Estate could permit VAC to issue a disclosure statement as opposed to a prospectus. The Superintendent of Real Estate appears to have exercised that discretion in this case*.* VAC’s disclosure obligations in a disclosure statement were limited to specific matters that were prescribed by the Superintendent of Real Estate (pursuant to *Real Estate Act*, ss. 66(3)(a) and (c)).
6. Rather than issuing a separate offering memorandum and a separate disclosure statement, the Superintendent of Real Estate and the Securities Commission appear to have allowed developers to issue one document that combined the two. The Hilton Disclosure Statement was such a document. In that document, as I have just explained, VAC was only required to disclose certain prescribed matters. Of those prescribed matters, the only two of relevance to this appeal are Items 9 and 13 of Form 43B.
7. Item 9 of Form 43B required VAC to include a statement drawing attention to the speculative nature and inherent risks of a real estate investment and to disclose specific factors that “make the offering a risk or speculation”:

 **ITEM 9 Risk Factors**

(1) State:

 **A real estate investment is, by its nature, speculative. If a purchaser is purchasing the real estate as an investment, the purchaser should be aware that this investment has not only the usual risks when purchasing real estate, but also those risks that are inherent to the nature of real estate securities.**

 (2) Disclose the risk factors that make the offering a risk or speculation.

 ***Instructions:*** Risk factors may include but are not limited to such matters as risks associated with real estate investments generally, reliance on the developer/managers efforts, ability and experience, inexperience of management, lack of financial expertise, reliance on the financial strength of the person offering the guarantee or financial commitment, cash flow and liquidity risks, financing risk, potential liability to make additional contributions beyond initial investments, restricted rights of a holder in the management and control of the strata corporation or business, inability to change the manager, restrictions on resale of the real estate securities, developer/manager conflicts of interests, and where the offering provides holders with a means to participate financially in a business such as a hotel, motel, resort or apartment hotel or other commercial enterprise, the general risks of the business, absence of an operating history of the business, and competition.

 (3) If the real estate securities include a rental pool, state:

 **The success or failure of the rental pool will depend in part on the abilities of the manager of the rental pool.**

 (4) If the owner will be responsible for paying a portion of the costs of the operation of the rental pool, state:

 **If the revenue generated from the rental pool is less than the costs of operating the rental pool, then the purchaser must make additional contributions over and above the purchasers initial investment and financing costs.**

 (5) If the real estate securities include a guarantee or other financial commitment, state:

 **The ability of [the person providing the guarantee] to perform under the [guarantee or other financial commitment] will depend on the financial strength of [the person]. See [the persons] financial statements on page [\*]. There is no assurance that [the person] will have the financial ability to be able to satisfy its obligations under the [guarantee or other financial commitment] and therefore you may not receive any return from your investment.** [Text in brackets in original.]

1. Item 13 of Form 43B required VAC to include a statement describing conflicts of interest and provided:

 **ITEM 13 Conflicts of Interest**

 Describe any existing or potential conflicts of interest among the developer, manager, promoter . . . in connection with the real estate securities which could reasonably be expected to affect the purchaser’s investment decision.

1. Article 4.9(i) of the Hilton Disclosure Statement is related to the Item 9 obligation to disclose risk factors:

4.9 **Risk Factors**

. . .

(i) **Liabilities and Obligations of the Developer.** The Developer is currently developing the Vancouver Airport Marriott, a 237 room full service hotel, on the Parent Property. The Vancouver Airport Marriott is scheduled for completion in or about June of 1998. In this regard, the Developer has entered into purchase agreements, ancillary documents similar in form and substance to the Agreements, and certain additional agreements with purchasers of strata lots comprising the Vancouver Airport Marriott, all of which give rise to certain liabilities and obligations of the Developer which could impact upon its ability to perform its obligations under the Agreements.

 (A.R., vol. II, at p. 164)

Article 4.1 of the Hilton Disclosure Statement provided that “Agreements” meant “the Bylaws, the Hotel Asset Management Agreement, the Hotel Use Covenant, the Joinder in Covenant Agreement and the Purchase Agreement”.

1. Article 4.11 is related to the Item 13 obligation to disclose conflicts of interest:

 4.11 **Conflicts of Interest**

 The Developer is not aware of any existing or potential conflicts of interest .  .  . that could reasonably be expected to materially affect the purchaser’s investment decision. . . .

 (2) Liability Under the *Real Estate Act*

1. Sharbern claims that VAC is liable for misrepresentations contained in arts. 4.9(i) and 4.11 of the Hilton Disclosure Statement in that they resulted in the “non-disclosure of a material conflict of interest” (A.F., at para. 1). There are two potential causes of action here: one under s. 75 of the *Real Estate Act*, and the other at common law under the tort of negligent misrepresentation. I will first deal with the cause of action under the *Real Estate Act*.
2. Section 75 of the *Real Estate Act* provides the statutory mechanism pursuant to which an investor can hold a developer liable with respect to the representations found in a disclosure statement. Under the *Real Estate Act*, if a “material false statement” is contained in a disclosure statement, the developer will be liable to investors for any resulting loss they may have sustained, and investors are deemed to have relied upon the representations made in the disclosure statement. However, s. 75 also contains a defence which provides that if the developer had reasonable grounds to believe and did believe that the material false statement was true, it would not be liable. (Although s. 75 uses the term “prospectus”, a disclosure statement is deemed under s. 66(2) of the *Real Estate Act* to be a prospectus for the purposes of the section.) The relevant parts of s. 75 of the *Real Estate Act* provide:

 **75** (1) In this section, **“prospectus”** includes every statement and report and summary of report required to be filed with the prospectus under this Part.

 (2) If a prospectus has been accepted for filing by the superintendent under this Part,

 (a) every purchaser of any part of the subdivided land, shared interests in land or time share interests to which the prospectus relates is deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not, and

 (b) if any material false statement is contained in the prospectus,

 (i) every person who is a director of the developer at the time of the issue of the prospectus,

 (ii) every person who, having authorized the naming, is named in the prospectus as a director of the developer,

 (iii) every person who is a developer, and

 (iv) every person who has authorized the issue of the prospectus

 is liable to compensate all persons who have purchased the subdivided land, shared interests in land or time share interests for any loss or damage those persons may have sustained, unless it is proved

. . .

 (viii) that, with respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, the person had reasonable grounds to believe and did, up to the time of the sale of the subdivided land, shared interests in land or time share interests believe that the statement was true . . . .

1. Under s. 75(2)(b) of the *Real Estate Act*, Sharbern has the onus to demonstrate that either or both of arts. 4.9(i) and 4.11 contained a “material false statement”. As the plaintiff, Sharbern bears this onus under the principle that the party who alleges a fact has the burden of proving it. Nothing in the language of s. 75 suggests that a plaintiff advancing a statutory cause of action under the *Real Estate Act* does not bear this onus. In order for art. 4.9(i) to contain a material false statement, the representation that VAC made indicating that it had entered into agreements with the Marriott that were “similar in form and substance” to those governing the Hilton must be shown to be a material false statement. For art. 4.11 to contain a material false statement, VAC’s representation that it was “not aware of any existing or potential conflicts of interest . . . that could reasonably be expected to materially affect the purchaser’s investment decision” must be found to be a material false statement. If Sharbern satisfies that onus, VAC must then demonstrate that it had reasonable grounds to believe and did believe that the material false statements were true, in order to rely on the defence.

 (3) Materiality

1. In *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331, Binnie J. wrote that “disclosure lies at the heart of an effective securities regime” and that the extent of disclosure is a matter of legislative policy that involves “[b]alancing the needs of the investor community against the burden imposed on issuers” (para. 5). The materiality standard for disclosure “supplants the ‘buyer beware’ mind set of the common law with compelled disclosure of relevant information” while “recogniz[ing] the burden” that is placed on issuers to provide such disclosure (para. 32).
2. A materiality standard is a legislated and regulatory balancing between too much and too little disclosure. As the Supreme Court of the United States cautioned in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), at pp. 448-49:

 . . . if the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management’s fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information — a result that is hardly conducive to informed decisionmaking.

1. Sharbern argues that in a prospectus context under the *Real Estate Act*, “asymmetries in knowledge and vulnerability” exist which would suggest that the materiality standard of disclosure should be high (A.F., at para. 32). I infer that it is Sharbern’s position that when balancing the requirement to disclose in a prospectus context, the emphasis should be on more disclosure. Although Sharbern does not suggest that VAC, in its capacity as developer, was acting as a fiduciary, Sharbern does say that VAC’s disclosure obligations should be the same as that of a fiduciary.
2. Potential investors are indeed vulnerable to the superior knowledge of an issuer as to what need and need not be disclosed. That is the reason for legislated disclosure obligations in a securities context. However, the jurisprudence has recognized that it is not in the interests of investors to be buried “in an avalanche of trivial information” that will impair decision making (*TSC Industries*, at p. 448). As I will explain, the materiality standard calls for the disclosure of information that a reasonable investor would consider important in making an investment decision.

 (4) The Test for Materiality

1. The *Real Estate Act* does not define what is meant by the term “material” when it is used in the context of the “material false statement” required for liability under s. 75. The parties submit that in interpreting materiality under s. 75, the Court should adopt the approach set out by the Supreme Court of the United States in *TSC Industries*. In that case, the materiality of an omitted fact in a proxy solicitation context was determined based on whether there was a substantial likelihood that the disclosure of the omitted fact would have assumed actual significance in the deliberations of a reasonable investor.
2. The materiality test was described by the U.S. Supreme Court in *TSC Industries*:

 . . . An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with *Mills’* general description of materiality as a requirement that “the defect have a significant *propensity* to affect the voting process.” It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available. [Emphasis in original; p. 449.]

The U.S. Supreme Court characterized materiality “as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts” (p. 450).

1. The *TSC Industries* test is not a new concept in Canadian securities law. The test has been adopted by a number of Canadian appellate courts: see *Sparling v. Royal Trustco Ltd.* (1984), 6 D.L.R. (4th) 682 (Ont. C.A.), aff’d [1986] 2 S.C.R. 537; *Harris v. Universal Explorations Ltd.* (1982), 17 B.L.R. 135 (Alta. C.A.); and *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610, 189 B.C.A.C. 251.
2. A disclosure statement under the *Real Estate Act* is analogous to the proxy solicitation in *TSC Industries*. The analogy exists because the two documents share similar characteristics. That is, both are (i) prepared unilaterally by management or a developer, (ii) prepared pursuant to statutory and/or regulatory obligations, (iii) used to provide information to investors (current or potential) to allow them to make informed choices, and (iv) used by investors in making decisions (either deciding how to vote or whether to invest). Both are used by investors to make informed investment decisions based on information provided to them by a party that unilaterally controls what specific information to disclose, pursuant to statutory obligations. Therefore, it is appropriate to consider the *TSC Industries* test to determine the materiality of the representations under the *Real Estate Act*.
3. The U.S. Supreme Court indicated that it was “universally agreed” that the question of materiality is objective (*TSC Industries*, at p. 445). Materiality is based on an examination of how the information would have been viewed by a “reasonable investor”. The U.S. Supreme Court concluded that the objective standard formulated in *TSC Industries* “best comports with the policies” (p. 449) of the proxy disclosure rules — the purposes of which were “not merely to ensure by judicial means that the transaction, when judged by its real terms, is fair and otherwise adequate, but to ensure disclosures by corporate management in order to enable the shareholders to make an informed choice” (p. 448).
4. In order to define the appropriate threshold as to “just how significant a fact must be” (*TSC Industries*, at p. 445) to a reasonable investor before it becomes material, the court imposed a standard that requires that there must be a “substantial likelihood” that an omitted fact “would” be considered important. This standard was imposed rather than the lesser standard which would require disclosure if an omitted fact “might” have been considered important. In adopting the “would” standard, the U.S. Supreme Court approved of the words of Chief Judge Friendly of the U.S. Second Circuit Court of Appeals in *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (1973), where he wrote:

 We think that, in a context such as this, the “might have been” standard . . . sets somewhat too low a threshold; the very fact that negligence suffices to invoke liability argues for a realistic standard of materiality. . . . While the difference between “might” and “would” may seem gossamer, the former is too suggestive of mere possibility, however unlikely. When account is taken of the heavy damages that may be imposed, a standard tending toward probability rather than toward mere possibility is more appropriate. [p. 1302]

1. At the same time, the U.S. Supreme Court clarified that a shareholder is not required to prove that the omitted fact would have caused a reasonable investor to change his or her vote. What is required is proof of a substantial likelihood that the omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder. The standard was seen as consistent with the court’s description of materiality in its earlier decision in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), that the defect or omission “have a significant *propensity* to affect the voting process” (p. 384 (emphasis in original)).
2. Given that materiality is determined objectively, from the perspective of a reasonable investor, I would add that the subjective views of the issuer do not come into play when assessing materiality. As I will discuss later, with respect to VAC’s liability under the *Real Estate Act*, VAC’s subjective views only are taken into account when considering the defence under s. 75(2)(b)(viii), not when considering whether a false statement was material. I make this observation because in art. 4.11 of the Hilton Disclosure Statement VAC represented that it was “not aware of any existing or potential conflicts of interest”. The Court of Appeal appears to have treated this language as importing a subjective element into the analysis of VAC’s conflict representation, rather than treating it as an element of the statutory defence.
3. Finally, the U.S. Supreme Court indicated that the importance of an omitted fact must be considered in the light of whether it would be viewed by a reasonable investor as having “significantly altered the ‘total mix’ of information made available”. In certain situations, evidence of the information made available may be such that common sense inferences will be sufficient to establish materiality. In other cases, where there is evidence that supports competing inferences, a court may be required to carry out a more complex analysis to determine what the reasonable investor would have considered important. For the majority of cases, materiality is a contextual matter, involving the application of a legal standard to specific facts, that must be determined in light of all of the information that was made available to an investor. Canadian and American authorities and commentary on materiality indicate that assessing materiality is a “fact-specific inquiry” (*Basic Inc. v. Levinson*, 485 U.S. 224 (1988), at p. 240). Materiality is “to be determined on a case-by-case basis” (p. 250) in light of all of the relevant circumstances.
4. The United States Securities and Exchange Commission (“SEC”), in SEC Staff Accounting Bulletin: No. 99 —“Materiality” (August 12, 1999 (online)), says that quantitative and qualitative factors should be considered in assessing materiality and that this requires “a full analysis of all relevant considerations” (pp. 2-3). The SEC wrote that “an assessment of materiality requires that one views the facts in the context of the ‘surrounding circumstances,’ as the accounting literature puts it, or the ‘total mix’ of information, in the words of the [U.S.] Supreme Court” (p. 3). A fact-driven, contextual approach to determine materiality is also recommended in the Canadian Securities Administrators *National Policy 51-201 Disclosure Standards* (July 12, 2002).
5. Despite materiality being a question of mixed law and fact, Sharbern asserts that “there is no need for a plaintiff to tender industry or expert evidence as to what would influence a reasonable investor because the question of materiality of conflicts of interest in a prospectus is uniquely for the court, involving a question of construction” (A.F., at para. 40). To support this assertion, Sharbern refers to the words of Binnie J. in *Kerr* where he wrote that “disclosure is a matter of legal obligation” (para. 54). In *Kerr*, Binnie J. was writing in the context of explaining that the business judgment rule “should not be used to qualify or undermine the duty of disclosure” (*ibid.*).
6. The business judgment rule is applied by courts when they are asked to resolve disputes involving business decisions made by managers (*Kerr*, at para. 54). In *Kerr*, Binnie J. adopted Weiler J.A.’s description of the business judgment rule at p. 192 in *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.) as follows:

 The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board’s determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board’s decision . . . . [Emphasis deleted . . . .] [Text in brackets in original; para. 54.]

1. Binnie J. explained that the business judgment rule has been traditionally justified with respect to business decisions because (i) “judges are less expert than managers in making business decisions”, and (ii) “[i]n order to maximize returns for shareholders, managers should be free to take reasonable risks without having to worry that their business choices will later be second-guessed by judges” (*Kerr*, at para. 58). These traditional justifications for the rule “do not apply to disclosure decisions” (*ibid.*).
2. As I have explained, the question of materiality involves the application of a legal standard to a given set of facts. Judges are not less expert than business managers when it comes to the application of a legal standard to a given set of facts; neither do managers’ assessments of risk have anything to do with meeting their disclosure obligations. As Binnie J. observed, “[i]t is for the legislature and the courts, not business management, to set the legal disclosure requirements” (*Kerr*, at para. 55).
3. Nothing in these reasons departs from the law as set out in *Kerr*. VAC’s statutory obligation in this case was to disclose certain prescribed matters and, in doing so, to not make material false statements. While VAC made its own assessment of what information it was required to include in the Hilton Disclosure Statement, it is the court that determines whether the disclosure made meets VAC’s legal obligations. The court must therefore inquire into what the reasonable investor would consider as significantly altering the total mix of information made available. This is a fact-specific inquiry, and except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention.
4. In carrying out a materiality assessment, a court must first look at the information disclosed to investors at the time they made their investment decision. In the present case, what I will refer to as “disclosed information” was the information contained in the Hilton Disclosure Statement. The next step in determining whether an omitted fact or information (“omitted information”) would be considered as significantly altering the total mix of information made available is to consider the omitted information against the backdrop of what was disclosed. In the present case, the significance of the Compensation Differences must be ascertained by comparing the omitted information (the guaranteed rate of return to Marriott Owners and the 5% management fee and added incentive payable to VAC by the Marriott Owners) to the disclosed information. As part of this second step, a court may consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. In this case, for example, evidence about the strong economic environment at the time investors made their investment decisions would help to evaluate whether the guaranteed rate of return given to Marriott Owners would have been significant in the context of the projections for high occupancy rates for the Hilton hotel that were disclosed in the Hilton Disclosure Statement.
5. Another type of evidence relevant to the materiality assessment is evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations (“behaviour evidence”). For example, a plaintiff would not be precluded from introducing evidence, if available, that the defendant acted on a conflict of interest even though that evidence pertained to events arising subsequent to the investors making their investment decisions. Similarly, a defendant would not be precluded from bringing evidence that investors had information not included in the disclosure documents at the time they were making their investment decisions, or that investors who had the information acted in a certain way. Beyond this behaviour evidence, evidence of common knowledge or, depending upon the circumstances, knowledge specific to particular investors would also be admissible. Nonetheless, in considering the question of materiality, the predominant focus is on the disclosed and omitted information.
6. In sum, the important aspects of the test for materiality are as follows:

i. Materiality is a question of mixed law and fact, determined objectively, from the perspective of a reasonable investor;

ii. An omitted fact is material if there is a substantial likelihood that it *would* have been considered important by a reasonable investor in making his or her decision, rather than if the fact merely *might* have been considered important. In other words, an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available;

iii. The proof required is not that the material fact would have changed the decision, but that there was a substantial likelihood it would have assumed actual significance in a reasonable investor’s deliberations;

iv. Materiality involves the application of a legal standard to particular facts. It is a fact-specific inquiry, to be determined on a case-by-case basis in light of all of the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors; and

v. The materiality of a fact, statement or omission must be proven through evidence by the party alleging materiality, except in those cases where common sense inferences are sufficient. A court must first look at the disclosed information and the omitted information. A court may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. As well, evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations is relevant to the materiality assessment. However, the predominant focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer.

 (5) Analysis of the Trial Judge’s Materiality Assessment

1. I now turn to the trial judge’s materiality assessment. In my respectful view, the trial judge made three interrelated errors of law in her treatment of the materiality of VAC’s alleged conflict of interest stemming from the Compensation Differences, which impact upon her assessment of whether the Hilton Disclosure Statement contained a material false statement. First, she equated the existence of a potential or actual conflict of interest with materiality, essentially treating a conflict of interest as inherently material. Second, she reversed the onus on Sharbern as plaintiff to prove materiality and placed an onus on VAC to disprove materiality. Third, she failed to consider all of the evidence available to her on the issue of materiality. I will deal with these errors in turn.
2. Although much time was dedicated to the question in her analysis, the key issue before the trial judge was not whether a potential or actual conflict of interest existed. The existence of non-material conflicts of interest had been acknowledged by VAC in arts. 4.9(i) and 4.11 of the Hilton Disclosure Statement. Rather, the key issue was whether the Compensation Differences and the potential or actual conflict of interest they created were *material*, thereby rendering VAC’s failure to disclose them “material false statements” attracting liability under the statute.
3. A careful review of Wedge J.’s reasons shows that once she had determined that there was a potential or actual conflict of interest, she found that there was an obligation to disclose the conflict as if the existence of the conflict itself was inherently material. For example, before she had even considered the issue of materiality, Wedge J. states, at para. 310, that “[g]iven the existence of the conflict described above, VAC was required to disclose the nature of those agreements” evidencing the Compensation Differences. Similarly, when speaking about the evidence led by VAC concerning the benefits to the hotels of sharing resources and expenses, she determined that “[i]t is for the investor to decide whether the benefits of cost and resource sharing outweigh the detriment of the conflict. An investor cannot engage in that weighing process unless the conflict is disclosed” (para. 304). Again, this is before the trial judge had made any determinations with respect to the materiality of the conflict of interest.
4. Treating a conflict of interest as inherently material led the trial judge to other manifestations of the same error of law. One is that she misinterpreted the statutory disclosure requirement. She said that the conflict of interest must be disclosed so that investors can weigh its costs and benefits against those of other factors. However, the statutory requirement does not impose on issuers an obligation to disclose all facts that would permit an investor to sort out what was material and what was not. This approach would not only result in excessive disclosure, regardless of materiality, it would overwhelm investors with information and impair, rather than enhance, their ability to make decisions.
5. Further, by holding that the failure to disclose the existence of conflict of interest is sufficient to attract liability for a material false statement, the trial judge misinterpreted the test for materiality. If the mere existence of a potential or actual conflict of interest creates an obligation to disclose it, without a proper inquiry into the materiality of the conflict, this approaches the standard of material fact used by the Court of Appeals in *TSC Industries* of “all facts which a reasonable stockholder might consider important” (*sub nom. Northway, Inc. v. TSC Industries, Inc.*, 512 F.2d 324 (7th Cir. 1975), at para. 3). That standard has been rejected by the U.S. Supreme Court and now by this Court in these reasons.
6. In assessing materiality, the trial judge pointed to the test set out in *TSC Industries* and concluded:

 I am satisfied that VAC’s ability to make more money under the Marriott guarantee when a potential customer chose the Marriott over the Hilton would have assumed actual significance in the deliberations of a reasonable investor, as would the fact that VAC made more money in management fees if the Marriott revenue was relatively higher than the Hilton revenue. [para. 321]

However, she does not address how or why there is a substantial likelihood that the Compensation Differences would be viewed by reasonable investors in the Hilton strata lots as significantly altering the total mix of the information made available. She appears to make a common sense inference that the Compensation Differences would have been material, without offering any analysis of how the conflict created by the Compensation Differences would fit into the mix of all other relevant information, nor does she take notice of what the total mix of information would be.

1. There was evidence, which I will discuss more fully below, which could have supported the opposite inference, that the Compensation Differences or the omitted information were not material in the context of what had already been disclosed to investors. For example, the disclosed information included information about the economic environment at the time of the sale of the strata lots; the financial benefits offered to the Hilton Owners, such as the management fee payable to VAC; information about common management by VAC and resulting risk factors; and information relevant to VAC’s limited ability to prefer its own interests. The trial judge also had behaviour evidence led by VAC about what the conduct of fully informed investors had been. In my view, this evidence demonstrated that competing inferences could be drawn in this case and added a layer of complexity to the materiality analysis that took it outside the realm of drawing a simple, common sense inference. A more detailed analysis of the evidence constituting the “total mix” of information was required in order to make a determination about what a reasonable investor would have considered significant.
2. Wedge J.’s error in treating a conflict of interest as inherently material is interrelated with her second error, which was to reverse the onus of proof. Once she was satisfied that Sharbern had proven the existence of a conflict of interest, she turned to VAC to show why it was not material. The result was that she made the determination that the conflict of interest was material without requiring Sharbern to satisfy its burden, as plaintiff, of proving materiality.
3. Having found a conflict of interest to be inherently material, the trial judge looked to VAC to show proof that it was not. She considered VAC’s submissions that the Compensation Differences would not have been material in light of all the disclosed information about common management in the Hilton Disclosure Statement. She then stated: “I cannot agree with VAC’s submission concerning materiality” (para. 320) and concluded that “the presence of an actual or potential conflict of interest on the part of [VAC] would concern any reasonable person contemplating investing more than $100,000 in a strata unit” (para. 321). While observing that “no expert evidence was advanced with respect to the knowledge of the reasonable investor” (para. 317), she neither proceeded with an analysis of other evidence of materiality adduced by Sharbern, nor commented upon the absence of any such evidence. As stated above, the onus of proving the materiality of a fact, statement or omission rests with the person alleging materiality. Sharbern did not adduce any evidence supporting the materiality of the Compensation Differences (other than the Hilton Disclosure Statement and the omitted information). It did not provide evidence to explain or place the omitted information into the context of the disclosed information in a way that would show its materiality. There is nothing in the trial judge’s analysis to indicate that Sharbern satisfied its burden.
4. The third error evident from the decision of Wedge J. is that she failed to consider all the evidence available to her on the issue of materiality. I am not unmindful that “[i]n reviewing the decisions of trial judges in all cases . . . it is important that the appellate court remind itself of the narrow scope of appellate review” with respect to factual matters (*Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 11; see also *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 46). When a question of mixed fact and law is at issue, the findings of a trial judge should be deferred to unless it is possible to extricate a legal error (*Housen*,at para. 37). Within this narrow scope of review, an appellate court may “reconsider the evidence” proffered at trial when there is a “reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his [or her] conclusion” and thereby erred in law (*Van de Perre*, at para. 15). As I will now explain, Wedge J. ignored and misconceived evidence relevant to the question of materiality in a way that affected her conclusions.
5. The statutory disclosure requirements only oblige issuers to disclose certain prescribed information. Where the issuer’s disclosure is challenged, the court must determine whether the omitted information was material in the context of the “total mix” of information made available to the investor. While Wedge J. considered some evidence in relation to materiality (i.e. the language and general circumstances surrounding the Hilton Disclosure Statement), she failed to consider other relevant evidence. For example, she rejected much of the evidence adduced by VAC as being irrelevant to the issue of the existence of a conflict of interest. There is no indication that she considered that evidence, as she was required to do, in assessing the materiality of the Compensation Differences.
6. As I will detail below, evidence of factors such as the general economic climate at the time the strata lots were sold, the financial arrangements offered to Hilton Owners, the disclosure made by VAC of common management and risk factors, and the limited extent of VAC’s ability to act upon the Compensation Differences in its own interests may be of little weight in determining whether a potential or actual conflict of interest existed as a result of the Compensation Differences. However, as mentioned above, those factors constituted disclosed information that would come into play as relevant to the issue of whether reasonable investors would have considered the omitted information important to their investment decision.

 (a) *The Economic Environment*

1. The Hilton Disclosure Statement warned that “[t]o the extent that there are more hotel rooms available in a particular market than there is demand for those rooms, then both occupancy and room rental rates may be adversely effected [*sic*]. There are other hotels which are planned for the Richmond and Vancouver markets” (art. 4.9(b)). However, it also stated that “Richmond is ranked as having the highest hotel occupancy of any market in Canada and the United States for the full year 1996” and was showing similar promise for 1997 (point 5 of the executive summary). The information about the high hotel occupancy rates in Richmond, coupled with the optimistic projections made in the Hilton Disclosure Statement, are relevant considerations the trial judge should have taken into account and suggested that the Hilton would not have a problem with occupancy rates, or need to worry about competition from the Marriott. This information about the economic environment was disclosed information forming part of the total mix of information made available to investors, against which they would have weighed the importance of the omitted information.

 (b) *Financial Benefits to Hilton Owners*

1. The omitted information about VAC’s agreements with the Marriott Owners would have been assessed by a reasonable investor in comparison to the disclosed information about the financial arrangements given to Hilton Owners. Although they did not receive a guarantee, the lower management fee of 3% instead of 5% and an added incentive had been given to Hilton Owners to increase their projected rate of return. The advantage of paying a low percentage management fee could have supported an inference that there were financial arrangements to counterbalance the omitted information about financial arrangements for the Marriott Owners even if they left the alleged incentive for favouritism unchanged.

 (c) *Disclosure of Common Ownership and/or Management and Risk Factors*

1. The Hilton Disclosure Statement disclosed that the developer of the Hilton was also developing the Marriott, and was the owner of the Richmond Inn. In the risk factors, VAC disclosed that its agreements with the Marriott “give rise to certain liabilities and obligations of the Developer which could impact upon its ability to perform its obligations under the Agreements” with the Hilton strata lot owners (art. 4.9(i)). VAC also disclosed that the Asset Manager would be the same for the Hilton and the Marriott, and that the day-to-day management of the Hilton would be subcontracted to the manager of the Richmond Inn. The Hilton Disclosure Statement states that “[t]he success of the Hotel will depend in large measure on the ability of the Developer as Asset Manager” and that “the success or failure of the Rental Pool will depend in part on the managerial abilities of the Asset Manager” (art. 4.9(e) (emphasis deleted)).
2. Although the trial judge rejected VAC’s submission that its disclosure of potential conflicts had been sufficient, she noted in her reasons that because the two hotels were in direct competition for clientele, “the interests of their owners were not congruent” (para. 299). Nonetheless, she acknowledged that “Hilton Owners consented to VAC acting for other principals competing in the same market” (para. 425). While all of this evidence was reviewed by the trial judge in other contexts, in my respectful opinion, she failed to assess whether there was a substantial likelihood that a reasonable investor in a Hilton strata lot would have viewed the Compensation Differences and their potential for creating a conflict of interest as significantly altering the information already possessed about the potential risk factors.

 (d) *VAC Had No Practical Means or Incentive to Favour the Marriott*

1. VAC led evidence at trial in an attempt to show why it would not have preferred the Marriott and that it did not do so. VAC submits that this evidence shows that the conflict of interest did not manifest itself in practice, and that VAC had no practical means or the incentive to favour the Marriott over the Hilton. VAC argues that this evidence “support[s] VAC’s conclusion that the potential conflict of interest was not material at the time of disclosure” (R.F., at para. 91). The trial judge considered this evidence in the conflict of interest stage of her analysis. There, she found that it did “not go to the issue of the existence of conflict” but rather “goes only to whether VAC would have acted on the opportunities raised by the conflict” (para. 306). She does not appear to have considered it with respect to whether it would be relevant to the question of materiality.
2. The evidence adduced by VAC that would show it had limited practical means and limited incentives to favour the Marriott over the Hilton includes evidence that VAC had a limited ability to market the hotels in a manner that favoured one hotel over the other. Evidence led at trial and discussed by the trial judge in her fiduciary duty analysis suggested about half of the hotels’ traffic was generated by marketing at the international/national level by the Hilton and Marriott chains. While we should avoid considering this percentage, which did not constitute disclosed information, the Hilton Disclosure Statement did disclose that investors could expect to “benefit from [the] strength of Hilton’s worldwide reservations system and the worldwide recognition provided by [the Hilton chains]” (point 3 of the executive summary).
3. The Hotel Asset Management Agreement under which VAC managed the Hilton hotel was disclosed information. That agreement required VAC to manage the Hilton hotel in a commercially reasonable manner and contained a number of obligations to use reasonable efforts. Even if the Hilton Owners had been aware of the omitted information, their concerns about any potential favouritism of the Marriott hotel would have been displaced by this contractual obligation imposed on VAC. The requirement to operate the hotel in a commercially reasonable manner would be inconsistent with VAC favouring one hotel to the detriment of the other, and served as a means to contractually preclude VAC from doing so.

 (e) *Evidence of Conduct of Fully Informed Investor*

1. Another piece of evidence that should have been included in the trial judge’s materiality assessment was that Tevan Trading Ltd. (“Tevan”) (the largest investor in the Hilton strata lots other than VAC’s parent company) owned units in both the Hilton and the Marriott. Tevan purchased six Hilton units on March 17, 1998, and then additional Hilton units on March 23, 1998, along with four Marriott units on the same day. The Marriott units became available to Tevan because certain buyers in the Marriott had cancelled their purchases. While the details of the Compensation Differences would have been known to Tevan when it invested in the Hilton on March 23, 1998, they did not appear to affect Tevan’s decision to invest in the Hilton as well as the Marriott. It is true that Tevan is only one investor, and there is no evidence about Tevan’s intentions in buying strata units in the Hilton and Marriott. Thus, one cannot jump to the conclusion that Tevan alone represents the “reasonable investor”. Nonetheless, the trial judge was required to consider this behaviour evidence as part of her determination of the substantial likelihood that a reasonable investor would have seen any conflict created by the Compensation Differences as significantly altering the total mix of information he or she had available.

 (f) *Evidence of the Investor Committee Meetings*

1. Finally, there was also relevant behaviour evidence concerning the Hilton Owners’ investor committee meetings. Minutes of those meetings record questions raised by the Hilton Owners over concerns they had with the hotel. There is no indication in these Minutes that the Hilton Owners were concerned about the Compensation Differences prior to the filing of their statement of claim in June 2003. This lack of concern would suggest that the Compensation Differences were not material.
2. In particular, VAC disclosed the existence of the guarantee in favour of the Marriott Owners at an investors committee meeting with the Hilton Owners on June 14, 2000. The timing of the disclosure of the differential management fee is not clear. While numerous concerns were raised by the investors during these meetings — ranging from concerns over pastry contracts to concerns over strata fees, advertising and the franchise agreement — none of the Minutes of any of the investor committee meetings subsequent to the June 14, 2000 disclosure record any questions that would evidence a concern over the guarantee.
3. Under the guarantee, VAC sustained a liability of over $13 million. The financial impact or incentive for VAC from the management fee differentials would have been considerably less. While the differential in management fees might be thought to support Sharbern’s argument that it created an incentive for VAC to favour the Marriott, from the perspective of the Hilton Owners, the lower management fee payable would also have appeared favourable to them. Further, VAC manager Timothy Mashford, who was present during many of the investor committee meetings, testified that at no time did any of the investors express any concern that the Hilton, Marriott and Richmond Inn were being commonly managed by VAC.
4. In sum, the evidence summarized in the preceding paragraphs should have been considered by the trial judge in applying the materiality standard to the facts of this case. Some of the evidence referred to above helps to place the omitted information in the factual context of the total mix of disclosed information, in order to evaluate whether the omitted information would have been considered important by reasonable investors in making their investment decisions. While not part of the total mix, the behaviour evidence of fully informed investors, either prior to making their investment decisions (e.g. the Tevan evidence) or subsequent to their investment (e.g. the investor committee meetings evidence), when they learned of the guarantee, was also relevant to the trial judge’s determination of whether the reasonable investor would have considered the Compensation Differences material.

 (6) Sharbern’s Burden of Proof

1. For its part, Sharbern was not required to prove that investors would not have purchased the Hilton strata lots had they known about the Compensation Differences. However, Sharbern did have the burden of proving, on a balance of probabilities, the substantial likelihood that disclosure of the omitted information would have significantly altered the total mix of information made available to reasonable investors in the Hilton strata lots.
2. To the extent it existed, in cases where common sense inferences are not sufficient, a plaintiff could lead the following types of evidence in the discharge of that burden:

i. that potential investors who knew of the Compensation Differences declined to invest in Hilton strata lots or exhibited concern and doubts about the investment because of them;

ii. that potential investors declined to invest in the Hilton strata lots because they found there was insufficient disclosure about the common management of the Hilton and Marriott hotels and the conflict of interest;

iii. that once the Hilton Owners became aware of the Compensation Differences, they expressed significant concerns about them and challenged VAC’s ability to properly manage the Hilton hotel in accordance with its contractual obligations;

iv. that VAC’s marketing efforts and management of the hotel were not carried out diligently in good faith; and

v. that VAC acted on the conflict of interest to the detriment of Hilton Owners.

Some of this evidence might have required expert evidence. However, if it existed, evidence could have been obtained through the pre-trial discovery process, including production of documents, or demonstrated at trial through the cross-examination of VAC’s employees. The above list is not exhaustive, nor is a plaintiff required to lead all of the evidence on that list in order to prove materiality. Because the materiality determination is case-specific, the evidence that is required in any given case will vary with the circumstances.

1. The only evidence adduced by Sharbern in relation to these types of considerations was evidence of a non-competition policy implemented by VAC in 2002 that provided that the Hilton, the Marriott and the Richmond Inn would not engage in price competition with respect to each other’s top ten clients by undercutting room rates. Without deciding upon the merits or actual effect of the policy, the trial judge commented that because the Marriott had been in operation one year longer than the Hilton, it had a competitive advantage over the Hilton such that any agreement favouring the *status quo* was to the benefit of the Marriott. Sharbern alleged that the policy was detrimental to the Hilton hotel and therefore proved that VAC had used its position as a common manager to favour the Marriott hotel and, consequently, its own interests.
2. As the non-competition policy was developed long after the time period of VAC’s statutory disclosure obligations, I will concentrate my analysis of it on the alleged breaches of fiduciary duty. As discussed more fully below, in my view the materiality of the non-competition agreement was not established on the evidence. The evidence was that the Marriott would match the Hilton’s pricing in order to retain customers. It is indeed dubious that any hotel would sit idly by and watch its competitor take its customers through lower pricing in a poor market environment without taking steps to retain those customers. It is apparent that VAC saw price competition as merely resulting in an attrition of revenue for all three hotels and sought to prevent such a result. That could hardly be seen as prejudicial to the Hilton. Moreover, whether or not it could be viewed as material or as having an effect on the Hilton occupancy rates would have depended upon an assessment of how it compared with the other arrangements that existed between the hotels, such as evidence about the sharing or referral of Marriott customers to the Hilton and Richmond Inn. We do not have the benefit of such an assessment.
3. Sharbern failed to adduce any other evidence to prove there was a substantial likelihood that disclosure of the Compensation Differences would have significantly altered the total mix of information that was made available to reasonable investors in the Hilton strata lots.

 (7) Conclusions on Materiality

1. In sum, the trial judge erred in law by treating this conflict of interest as inherently material, reversing the onus of proof of materiality, and failing to consider all of the evidence relevant to the determination of materiality. It also appears from the record before the trial court that no evidence was adduced by Sharbern which could reasonably have supported a finding that the Compensation Differences and any conflict of interest they created were material. Separating materiality from the conflict of interest analysis, applying the burden of proof appropriately and taking account of all relevant evidence, I am of the opinion that it has not been demonstrated that there was a substantial likelihood that disclosure of the Compensation Differences would have assumed actual significance in a reasonable investor’s investment decision.

B. *The Statutory Defence*

 (1) The Legal Test

1. Even if VAC were found to have made a “material false statement”, s. 75(2)(b)(viii) of the *Real Estate Act* provides VAC with a defence if it can prove that it “had reasonable grounds to believe and did, up to the time of the sale . . . believe that the statement was true”. To rely on the defence, VAC had to show (1) that it subjectively believed the representations it made were true, and (2) that it objectively had “reasonable grounds” for such a belief. In considering the defence, the question is not whether VAC’s conclusion itself was reasonable. Rather it is whether VAC subjectively believed its representations, and whether that belief had an objective basis in the sense that there were reasonable grounds for the belief.
2. The statutory defence found in s. 75(2)(b)(viii) of the *Real Estate Act* does not appear to have been considered by the trial judge. It is not mentioned by her at any point. At para. 323, Wedge J. reproduced portions of s. 75 of the *Real Estate Act*; however, she did not go so far as to reproduce the portion of s. 75 that contained the statutory defence. In addition, the common liability questions made no mention of the statutory defence.
3. When a trial judge does not consider a statutory defence, an appellate court may do so or remit the defence to the trial court for its consideration (*Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at para. 33). In this case, it is both feasible on a practical level and in the interests of justice for this Court to make a fresh assessment of the evidence on the record with respect to the defence.
4. In my opinion, even if VAC were shown to have made a material false statement, the statutory defence contained in s. 75(2)(b)(viii) of the *Real Estate Act* would preclude VAC from being found liable under s. 75(2). As I will shortly explain, the evidence indicates that VAC subjectively believed, and objectively had reasonable grounds to believe, that it was making true statements when it did not disclose the details of the Compensation Differences and represented in the Hilton Disclosure Statement: (i) that it had entered into agreements with the Marriott that were “similar in form and substance” to those governing the Hilton (art. 4.9(i)); and (ii) that it was “not aware of any existing or potential conflicts of interest . . . that could reasonably be expected to materially affect the purchaser’s investment decision” (art. 4.11).
5. The evidence establishing the subjective and objective components of the defence is evidence of (i) common industry practices and (ii) VAC’s limited practical means and incentives to prefer the Marriott. Significantly, Sharbern did not draw this Court’s attention to any evidence that would negate the defence.

 (2) Common Industry Practice Evidence

1. The Hilton Disclosure Statement disclosed that VAC’s parent company, Larco Investments, itself or through its subsidiaries, concurrently owned or managed a Delta and a Ramada hotel in Vancouver, a Holiday Inn at Whistler, a Delta and a Radisson hotel in Toronto and other hotels across Canada. As noted by the Court of Appeal, “VAC relied on the extensive factual and expert evidence it adduced concerning actual and industry practice in the management of multiple hotels by a single entity. There was no evidence to the contrary and no evidence objectively to support the conclusion a reasonable investor would be concerned about the details of the financial arrangements” (para. 76).
2. Wedge J. rejected VAC’s industry practice evidence finding it of “little probative value” in relation to whether it proved that a conflict of interest existed in the common management of the Hilton and the Marriott (para. 296). This finding was based on her view that

 there was no evidence offered by VAC (or its experts) as to whether those properties were in the same competitive set, whether the management fee or other financial arrangements governing the properties were the same, whether those details were disclosed to the owners, or, most importantly, whether there were representations to investors concerning potential or actual conflicts of interest as a result of common management. [*ibid.*]

However, as I will now explain, I am of the opinion that Wedge J. erred in law when she said that there was “no evidence”, as there was evidence. Further, while proving the lack of a material conflict of interest in one common management scenario may be of little help in proving or disproving the existence of a material conflict of interest in another, evidence that hotel managers routinely act for competing hotels would be relevant to the question of whether resulting conflicts of interest are generally seen as material.

1. VAC adduced evidence that it was a common industry practice for different hotels to be commonly managed in the same market, with different management contracts and financial arrangements for each hotel, and with different owners who were not aware of the terms of the contract with the other hotels. VAC’s witnesses, including Joann Pfeifer, testified that they believed that common management would be an advantage allowing the participating hotels to maximize profits. Joel Rosen, who was qualified as an expert in the hotel consulting field, testified that it was a common practice in the hotel industry for the same manager to commonly manage competing hotels in the same market and that this practice had “been the case for many years” (R.R., vol. 6, at p. 1159). In his expert report, Mr. Rosen opined that “a hotel management company operating multiple competing properties in a market is not uncommon” (R.R., vol. 30, at p. 6006). By way of example he discussed certain luxury hotels in various cities in the United States, remarking that

 the management contracts may be the same or different in each city, depending on the negotiations at the time the contracts were determined. The fees may differ, the calculation of the incentive fee may differ, the termination clause may differ, etc. The contracts do not mirror each other at all in each city and in fact the owner of one hotel would not know the terms of the contract at the other hotel in their city.

 (*Ibid.* (emphasis added))

1. VAC also adduced evidence of the perspective and experience of its principals and senior managers. VAC’s sole director and officer, Amin Lalji, when asked about separately owned, commonly managed hotels, testified that “there were plenty of examples prevailing in the market where this is a common practice of most hotel companies, where they would be managing hotels for different ownership structures” (R.R., vol. 8, at p. 1478). Lalji then cited examples in the B.C. market in which there was common management of competing hotels. Similarly, a senior manager hired by Lalji, Joann Pfeifer, testified that some of the Delta hotels in Vancouver were managed by the same company, with different owners, and with different compensation structures in place for the manager.
2. The evidence is that it was a common industry practice for different competing hotels to be commonly managed with the different owners not being aware of the terms of the contracts at each hotel. From this evidence, it can be inferred that VAC had both a subjective and objective basis for concluding that a reference to the Compensation Differences in the Hilton Disclosure Statement was neither expected nor required.

 (3) Evidence of Limited Practical Means and Incentives to Prefer

1. The evidence of VAC’s limited practical means and incentives to prefer the Marriott over the Hilton (which I summarized above) is also relevant to determining whether the subjective and objective components of the statutory defence have been established. For example, evidence, provided on the details of industry and client practices that would have affected comparative occupancy rates and limited VAC’s ability to induce Hilton clients to switch to the Marriott, is relevant to whether there was an objective basis for VAC’s belief that the Compensation Differences were not material. Evidence was adduced that relative hotel occupancy was affected to a large degree by independent factors such as international or national marketing.
2. With respect to the hotel business that was generated locally, the trial judge observed that much was won through a formal request-for-proposal process from corporate clients. The manner in which VAC participated in this formal request-for-proposal process would have been subject to VAC’s contractual obligations under the Hotel Asset Management Agreement to manage the Hilton in a commercially reasonable manner. To avoid liability for breach of contract, VAC would have no room under the formal request-for-proposal process to market the hotels in a manner that favoured the Marriott over the Hilton. Thus, there was an objective basis for VAC believing that, even if the Compensation Differences created an incentive to favour the Marriott, it could not have materially affected the relative occupancy rates of the Hilton or the Marriott had it tried to do so.
3. Evidence of VAC’s knowledge and motivations would also be relevant to the inquiry. Such evidence included testimony provided by VAC’s senior manager that she could not have retained managers for the Hilton and the Marriott if these managers had been directed to favour one hotel over the other. One of VAC’s principals also testified that neither Larco Investments nor VAC would have risked their reputations by engaging in preferential conduct.
4. Further, evidence about the sharing of common resources and expenses between the Marriott, the Richmond Inn and the Hilton, such as joint contracts for airport shuttle bus service, airline crew transportation, dry cleaning, hotel laundry and armoured car pickup, and shared personnel such as a chief engineer, executive housekeeper and payroll assistant, substantiates VAC’s belief that the Hilton would derive benefits from the common management arrangement. In my opinion, the efficiencies of shared services and the potential for business referrals could reasonably have factored into VAC’s assessment of whether the Compensation Differences were material.
5. According to s. 75(2)(b)(viii) of the *Real Estate Act*, the relevant time period to assess VAC’s beliefs is “up to the time of the sale”. When the lots were being marketed, occupancy rates were expected to remain high. The evidence was that VAC would not have been concerned at that stage about liability from the guarantee of gross revenues given to Marriott Owners, especially given that, on the evidence, it had intended to make the same offer to Hilton Owners until dissuaded by legal advisors. Similarly, it had reduced the management fee payable by Hilton Owners, not to provide a benefit to itself or an advantage to Marriott Owners, but in order to give increased revenues to Hilton Owners.
6. In my view, the evidence supports the claim that VAC subjectively believed and had a reasonable basis for believing that the financial arrangements for the two developments were similar, despite the differences in detail. It is no coincidence that Sharbern’s action against VAC focussed mainly on the claims of negligent misrepresentation and fraud in relation to the financial projections. Occupancy rates and how they might be influenced by the Compensation Differences only seemed important in hindsight, with the change in economic conditions, 9/11, the SARS crisis, and the increased supply of hotel rooms in Richmond.
7. The evidence adduced by VAC proves, on a balance of probabilities, that VAC subjectively believed and had reasonable grounds for believing that the Compensation Differences would not materially affect a purchaser’s investment decision, that its agreements with the Marriott Owners were similar to its agreements with the Hilton Owners, and that the representations it made in the Hilton Disclosure Statement were true.

 (4) No Evidence to Negate the Defence

1. Sharbern did not direct this Court to any evidence to the contrary or to specific passages in the reasons of the trial judge that would have negated the defence established by VAC’s evidence. During oral argument, when asked if there was a specific passage in the trial judge’s reasoning that negated the defence, Sharbern’s counsel observed that there was “not a specific passage” but rather that “the burden of [the trial judge’s] reasoning as a whole” was responsive to the question of the defence (transcript, at p. 9). Counsel also asserted that “it would be obvious in the circumstances” (*ibid.*, at pp. 8-9). With respect, it is not obvious, particularly in light of the evidence led by VAC showing that the subjective and objective components of the defence had been established.
2. A finding of fraud at trial would have contradicted the conclusion drawn from the evidence that VAC subjectively believed the truth of its representations. There was no such finding. Similarly, a finding that VAC negligently misrepresented the absence of a potential or actual conflict of interest in the Hilton Disclosure Statement could preclude VAC from proving that there were reasonable grounds for its belief in the truth of its representations, and prevent it from establishing the objective basis of its statutory defence. However, as I will set out more fully below, in my view the trial judge did not consider all of the elements necessary to establish negligent misrepresentation.
3. As a result, even if VAC were found to have made material false statements, VAC cannot be held liable under s. 75 of the *Real Estate Act* because the evidence establishes that the statutory defence found in s. 75(2)(b)(viii) applies.

C. *Deemed Reliance*

1. A final issue with respect to VAC’s potential liability under the *Real Estate Act* is whether the deemed reliance provided for under the statute is rebuttable when the contrary is proved, with evidence, on a balance of probabilities. Section 75(2)(a) of the *Real Estate Act* provides that every purchaser of any part of land to which a prospectus relates “is deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not”. Given my conclusion that VAC cannot be held liable for making material false statements under the *Real Estate Act*, it is not strictly necessary to consider whether the deemed reliance provided under that Act is rebuttable. The issue is even less germane given the subsequent repeal of the *Real Estate Act*. Nevertheless, as both parties argued the issue on appeal, I will briefly comment on the matter.
2. The trial judge found that deemed reliance is not rebuttable. She concluded that the purpose of the *Real Estate Act* was to “protect the investing public” (para. 333). She wrote that it would “undermine the purpose of the legislation” to allow a developer to attempt to rebut the presumption and “direct the focus of the inquiry to what the investor knew rather than what the developer failed to disclose” (*ibid.*). The Court of Appeal came to the opposite conclusion. It found that deemed reliance is rebuttable because the language used in s. 75 did not expressly create a non-rebuttable presumption.
3. The *Real Estate Act* used the words “*deemed* to have relied”. In *St. Peter’s Evangelical Lutheran Church v. Ottawa*, [1982] 2 S.C.R. 616, at p. 629, the majority of this Court wrote that “the words ‘deemed’ or ‘deeming’ do not always import a conclusive deeming into a statutory scheme” and that “[t]he word must be construed in the entire context of the statute concerned.”
4. Sharbern submits that the broad purpose of the *Real Estate Act* is to protect investors, and that investors are best protected when they do not have to prove reliance. It argues that conclusive deeming strengthens an investor’s civil right of action, particularly when a class action is involved, and makes it more likely that a wronged investor will prosecute his or her claim without having to focus on what was read or understood by the investor or what motivated the investor to invest. Sharbern also contends that textual considerations, like the structure of s. 75, suggest the deemed reliance is not rebuttable.
5. I do not accept Sharbern’s argument that the purpose of the *Real Estate Act* would be undermined by allowing deemed reliance to be rebutted. The successor legislation to the *Real Estate Act*, the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, allows for the deemed reliance provided in s. 22(3) of that Act to be rebutted under s. 22(5) when it can be proven that “the purchaser had knowledge of the misrepresentation at the time at which the purchaser received the disclosure statement”. The related *Securities Act* also provides at s. 131 for rebuttable deemed reliance on misrepresentations in a prospectus. The existence of rebuttable presumptions under this successor and related legislation suggests that such presumptions accord with the investor protection purposes of those Acts.
6. I acknowledge that the *Real Estate Act*, unlike the successor and related legislation, did not expressly provide for a rebuttable presumption. Nonetheless, as *St. Peter’s* indicates, the use of the word “deemed” does not always result in a conclusive, non-rebuttable presumption. It is the purpose of the statute that must be examined in order to determine if the presumption is rebuttable. The successor and related legislation in this case can assist with interpreting the purpose of deemed reliance in the *Real Estate Act*. Lord Mansfield explained this principle in *R. v. Loxdale* (1758), 1 Burr. 445, 97 E.R. 394, observing that “[w]here there are different statutes in pari materia though made at different times, or even expired, . . . they shall be taken and construed together . . . and as explanatory of each other” (p. 395). Estey J. provided a more modern explanation of this principle, and explained how “sometimes assistance in determining the meaning of [a] statute can be drawn from similar or comparable legislation within the jurisdiction or elsewhere” (*Nova, an Alberta Corp. v. Amoco Canada Petroleum Co.*,[1981] 2 S.C.R. 437, at p. 448).
7. As I have discussed above, disclosure is a matter of legislative policy that involves “[b]alancing the needs of the investor community against the burden imposed on issuers” (*Kerr*, at para. 5). A non-rebuttable presumption could interfere with this balancing and would not serve the statutory purpose behind legislated disclosure obligations. For example, a non-rebuttable presumption would allow an investor to claim reliance on a misrepresentation, even if the investor was fully informed and had complete knowledge of all the facts. In doing so, the issuer would be held liable for a misrepresentation of which the investor was fully aware. This would be an absurd and unjust result, which would place issuers into the position of having to guarantee the losses of fully informed investors. The purpose of the disclosure obligation is to balance the amount of disclosure made, not to place VAC into the role of insurer for Sharbern and the other Hilton Owners.
8. Given that similar statutes expressly allow deemed reliance to be rebutted, the legislature does not view rebuttable presumptions to be contrary to investor protection. Further, a non-rebuttable presumption could be contrary to the legislative balancing that underlies the disclosure requirements in the *Real Estate Act* and would result in absurd and unjust results. I would therefore conclude that the presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase.

D. *Common Law Negligent Misrepresentation*

1. In addition to its claim under s. 75 of the *Real Estate Act*, Sharbern alleges that VAC is liable for the tort of negligent misrepresentation. The trial judge did not distinguish between the common law and statutory causes of action in her reasons, and they were not distinguished in the list of common issues on liability. Nonetheless, I proceed on the basis that when the trial judge found that “VAC negligently misrepresented” (paras. 322 and 473) the Compensation Differences, this finding applied to both the statutory and common law causes of action.
2. I am of the opinion that the trial judge’s findings pertaining to the common law of negligent misrepresentation cannot stand because she did not consider all of the elements necessary to establish the tort. As set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87:

The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a “special relationship” between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. [p. 110]

1. The requirements set out in *Cognos* were not included in the list of common liability issues. Nor was the framework discussed or utilized by the trial judge in her reasons. While she clearly dealt with the duty of care, and it might be inferred that her misrepresentation analysis dealt with whether the Compensation Differences were untrue, inaccurate or misleading (though this was not done so expressly), the trial judge did not consider the third *Cognos* requirement. She also did not consider the fourth requirement of reasonable reliance and fifth requirement of resulting damages. However, reasonable reliance and damages would likely be dealt with in the class action proceeding through future common or individual trials.
2. The third *Cognos* requirement obligated Sharbern to prove that VAC had “acted negligently in making [the] misrepresentation”. This requirement is concerned with the standard of care, and was described by Iacobucci J. in *Cognos*:

 The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, “reasonable person”. The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading . . . . [Emphasis added; p. 121.]

1. In considering the standard of care, the trial judge would have had to address whether, on an objective basis, VAC had taken such reasonable care as the circumstances required to ensure that the representations made in the Hilton Disclosure Statement were accurate and not misleading. She made no such finding. Instead, she summarily concluded that VAC “negligently misrepresented” the Compensation Differences, without having addressed the standard of care.
2. Sharbern submits that the trial judge’s conclusion that VAC’s representations were negligent is “sound” (A.F., at para. 47). In oral argument, counsel for Sharbern conceded that the trial judge’s “reasoning is sparse on her conclusion as to negligence” but insisted that her conclusion was “obvious in the circumstances” (transcript, at pp. 8-9).
3. I am unable to agree. I do not think it appropriate to collapse the *Cognos* requirement into a bare assertion of obviousness. Failure to demonstrate how VAC breached the standard of care is fatal to Sharbern’s common law claim. Sharbern, as plaintiff, bears the burden of proving its allegations. Sharbern does not point to evidence that could support a finding that the standard of care was breached. Nor does it explain how such a conclusion could have been reached based on the trial judge’s “sparse” reasoning.
4. Rather, Sharbern asserts that it was not required to adduce expert evidence as to what a developer ought to disclose. It argues that the case is about an experienced businessman (Mr. Lalji) who, while aware of the undisclosed incentive, defends his failure to disclose it by assuring us he would not put his own interests first. Sharbern contends that VAC’s evidence of its reliance upon industry and expert evidence and upon the advice of its solicitors in respect of its disclosure obligations did not establish that VAC did not breach the standard of care.
5. Nonetheless, in the circumstances of this case, a bare assertion that something is obvious, without more, cannot establish the applicable standard of care. In the face of considerable evidence before the trial court as to why the Compensation Differences or the potential conflict of interest they created would not have been material to the decision of investors, Sharbern did not provide the court with any evidence to counter VAC’s position. For this reason, Sharbern’s common law claim of negligent misrepresentation must fail.
6. I would add one observation on the fourth *Cognos* requirement — reasonable reliance. In this case, Sharbern did not adduce evidence of actual reliance. Instead it relied upon the statutory deeming provision in the *Real Estate Act*. While the trial judge appears to have contemplated the necessity of individual trials on the issue of reliance at the outset of this litigation, her failure to differentiate between the common law and statutory claims in her reasons conveys the impression that the statutory deeming provision can establish common law reliance, removing the need for further trials. This approach would be problematic. I do not think a plaintiff may dip into a statutory cause of action for a helpful element in order to establish the “actual reliance” required to maintain a common law claim for negligent misrepresentation.
7. For these reasons I conclude that VAC cannot be held liable for negligent misrepresentation at common law.

E. *Breach of Fiduciary Duty*

1. The final issues to be determined in this appeal are whether a fiduciary duty existed between VAC and Sharbern and, if so, whether VAC breached that fiduciary duty. The breach issue can be broken down into two aspects: (i) whether VAC breached its fiduciary duty to Sharbern by failing to disclose the alleged conflict of interest created by the Compensation Differences; and (ii) whether VAC breached its fiduciary duty to Sharbern when it implemented the non-competition policy between the Hilton, the Richmond Inn and the Marriott. I will deal with these issues and sub-issues in turn.

 (1) Lower Court Treatment of the Fiduciary Duty Issues

1. Wedge J. described the content of VAC’s fiduciary duties to Sharbern and other Hilton Owners in the following terms:

 . . . I find that VAC did not owe a fiduciary duty to not work for other principals competing in the same hotel market as the Hilton. I also find that VAC did not owe a duty to the Hilton Owners to disclose information that it had received from its other principals. Rather, the Hilton Owners consented to VAC acting for other principals competing in the same market, and could expect VAC to keep all information it received from each of its principals confidential.

. . .

 I find that VAC owes the following fiduciary duties to the Hilton Owners:

 1. A fiduciary duty to not act for other principals competing in the same market and with respect to whom VAC has a personal interest in favouring.

 2. A fiduciary duty to not act as agent for the Hilton Owners and any third party contracting with them without first making complete disclosure to them and obtaining their consent. [paras. 425 and 429]

1. The trial judge went on to find that, as a result of the Compensation Differences, VAC had a personal interest in favouring the Marriott over the Hilton. She concluded that

 VAC’s personal interest in favouring the Marriott over the Hilton conflicts with its fiduciary duty to the Hilton Owners. Unless VAC disclosed this conflict of interest, and obtained fully informed consent from the Hilton Owners to act in those circumstances, it would be in breach of its fiduciary duty by continuing to act. [para. 439]

1. Wedge J. then confirmed that whether the common management of the Hilton and the Marriott had affected the operation of the Hilton to its detriment had not been quantified on the evidence, and did not need to be quantified at that stage in the proceedings. However, she found that there was some evidence “that the Hilton has been disadvantaged by the common management” (para. 447). By this she was referring to a non-competition policy VAC implemented between the Hilton, the Richmond Inn and the Marriott. Since the Hilton brand was proving weaker than the Marriott, senior management at the Hilton tried to lure away corporate clients from the Marriott by undercutting the Marriott’s room rates. When the Marriott complained that this was eroding business and causing both hotels to lose money, sales staff proposed that the Hilton, Marriott and Richmond Inn agree not to pursue the top ten corporate preferred accounts of each by offering lower rates. However, other forms of inducement were permitted. The non-competition policy was implemented in 2002.
2. Wedge J. considered this arrangement to be an agreement between the Hilton and the Marriott with VAC acting as agent for both. Irrespective of the merits of the contract, she found it to be a breach of VAC’s equitable obligation to the Hilton Owners to commit them to a contract with another party for whom VAC was also acting as agent, without obtaining the Hilton Owners’ informed consent.
3. The Court of Appeal found that there was no breach of fiduciary duty. Chiasson J.A. interpreted the trial judge’s reasoning to mean that VAC was in breach of its fiduciary duty as soon as it contracted with the Hilton Owners because of its agreement with the Marriott Owners. However, having previously concluded that VAC did not misrepresent its arrangements with the Marriott Owners, he found that VAC was not in breach of fiduciary duty on entering into the contract with the Hilton Owners. In his view, the issues were interrelated. He reconfirmed that “in this case, the relationship between VAC and the Marriott Hotel unit owners was disclosed” and that the question of whether VAC was in breach of its fiduciary duty because of its failure to disclose the Compensation Differences “depends on whether that information was material” (para. 98). Chiasson J.A. concluded that “in the circumstances of this case, the information objectively was not material” (para. 99).
4. Chiasson J.A. also held that “the consent given to VAC to act for competing hotels is an answer to any contention the implementation of the price competition policy was *per se* a breach of fiduciary duty” (para. 104). The issue again turned on whether VAC had been required to disclose the Compensation Differences, and in his view, it was not.

 (2) A Fiduciary Relationship Existed

1. VAC argues that the trial judge erred in finding that VAC’s relationship with Sharbern was fiduciary in nature. VAC says that the trial judge’s “decision to characterize VAC as a fiduciary was not based on a careful consideration of the individual relationship between the parties” but was instead based on a “simplistic categorical analysis” in which “[s]he held that VAC was in some respects [Sharbern’s] agent, and that the principal-agent relationship was a classic fiduciary relationship” (R.F., at para. 112). VAC submits that the parties were simply dealing in an arm’s-length commercial relationship characterized by self interest.
2. I cannot agree with VAC’s position. In my opinion, the trial judge did not conduct a “simplistic categorical analysis”. She made a comprehensive review of the jurisprudence and observed that “[f]iduciary duties will not necessarily exist in all agency relationships” (para. 398). She then carefully considered the relationship that existed under the Hotel Asset Management Agreement before concluding that the relationship was fiduciary. She noted that VAC was given discretion as a manager, that it had the ability to unilaterally affect the hotel owners’ legal or practical interests, and that the hotel owners were especially vulnerable in that regard. It is clear that she evaluated the relationship created under the Hotel Asset Management Agreement in light of the typical characteristics of fiduciary relationships set out by Wilson J. in her well-known dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 136.
3. In my opinion, there is no basis upon which to differ with the conclusion of the trial judge that while acting as manager of the Hilton, VAC owed fiduciary obligations to the Hilton Owners, including Sharbern.
4. That said, the nature and scope of the fiduciary duty owed by VAC must be assessed in the context of the contract giving rise to those duties. As noted by Cromwell J., for a unanimous Court, in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 75: “. . . what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her”. He also stated that “[i]n cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue” and that “[t]he fiduciary’s undertaking may be the result of . . . the express or implied terms of an agreement” (para. 77). While an express undertaking can be found in the terms of a contract for an agency relationship, an implied undertaking can be found with regard to “the particular circumstances of the parties’ relationship” which could include “professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary’s loyalty” (para. 79).
5. In this case, purchasers in the Hilton strata lots knew that they would be entering into the Hotel Asset Management Agreement giving VAC exclusive management of the hotel for at least 20 years. In exchange, VAC contracted to, among other things, use commercially reasonable efforts to rent out the strata units, maximize each owner’s proportionate share of monies available for distribution, and faithfully perform its duties and responsibilities and supervise and direct hotel operations. The Hilton Disclosure Statement explained to investors that the success or failure of the rental pool would depend in part on the managerial abilities of the manager. It also contained the reassurance that VAC’s related companies had experience in concurrently owning or managing competing hotels. Investors undoubtedly counted on VAC to provide managerial experience and expertise. However, they did so understanding and consenting to VAC receiving a management fee, and acting as the manager of the competing Marriott hotel. Disclosure of that conflict position was coupled with the warning that this “could impact upon its ability to perform its obligations under the [Hotel Asset Management Agreement]” (art. 4.9(i)).
6. While Sharbern was in a fiduciary relationship with VAC, and VAC owed a duty to use its discretionary powers as manager to act in the interests of Sharbern, this relationship was entered into with the knowledge that there would be common management of the Hilton and Marriott, and that VAC’s related companies had a history of concurrent ownership or management of competing hotels. The fiduciary relationship in this case must therefore be circumscribed by the contractual bargain and the knowledge that VAC would be simultaneously balancing fiduciary obligations owed to the Hilton Owners and owners of a competitor: *Galambos*, at para. 79.

 (3) Distinguishing the Misrepresentation and Fiduciary Duty Claims

1. When VAC issued the Hilton Disclosure Statement, it was acting in its role as a developer/issuer, and was not an agent of Sharbern. As issuer, its relationship with Sharbern was not fiduciary in nature. An issuer and investor in these circumstances deal with each other in an arm’s-length commercial relationship characterized by self interest.
2. However, when VAC began acting as Sharbern’s agent under the Hotel Asset Management Agreement, a fiduciary relationship arose.
3. It is important to recognize that these are two distinct relationships that happen to be between the same parties: a non-fiduciary issuer-investor relationship, and a fiduciary principal-agent relationship. Therefore, although the underlying factual basis of the issuer-investor misrepresentation issue and the principal-agent fiduciary duty issue are largely the same, the two issues constitute distinct causes of action arising at different *times*. The misrepresentation claim is related to VAC’s disclosures made when it was the developer of the Hilton hotel and issuer of the Hilton Disclosure Statement. The breach of fiduciary duty claim is related to VAC’s activities when it began acting as an agent and managed the Hilton hotel.

 (4) Disclosing the Compensation Differences

1. The question to be answered here is whether VAC breached its fiduciary duty to Sharbern and the other Hilton Owners while acting as their hotel asset manager, by failing to disclose the Compensation Differences and obtaining the informed consent of the Hilton Owners.
2. A breach of fiduciary duty would occur if the undisclosed Compensation Differences were material or placed VAC into a conflict of interest to which Sharbern had not consented. This is because equity “forbids trustees and other fiduciaries from allowing themselves to be placed in ambiguous situations. . . . [T]hat is, in a situation where a conflict of interest and duty might occur” (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters’ Law of Trusts in Canada* (3rd ed. 2005), at p. 914). As M. Ng writes, in *Fiduciary Duties: Obligations of Loyalty and Faithfulness* (loose-leaf), at p. 2-10:

 Where fiduciaries put themselves in a position where their own interests or those of others may conflict with their duty to their principal, they will be required to disclose all material information regarding the transaction in order to obtain their principal’s informed consent as to their acting despite the conflict.

1. Sharbern submits that the question of whether VAC breached its fiduciary duty to avoid undisclosed conflicts of interest was “one of consent” (A.F., at para. 54). That is, Sharbern argues that the Court must ask whether VAC “made sufficient disclosure, in the [Hilton Disclosure Statement], of the facts pertaining to its conflict of interest that investors purchasing under the [Hilton Disclosure Statement] must be taken to have consented to the conflict” (*ibid.*). Sharbern’s position is premised upon the assumption that the Compensation Differences constituted a material fact or information beyond what had already been disclosed. If that were true, then the onus would fall on VAC, as fiduciary, to prove that it had received the informed consent of the Hilton Owners with respect to the Compensation Differences: *McGuire v. Graham* (1908), 11 O.W.R. 999 (C.A.), at pp. 999-1000.
2. However, the materiality of the Compensation Differences must first be established. This is because “[n]ot every self-interested act by a fiduciary conflicts with his fiduciary duties; otherwise, he could never do anything for his own benefit” (*Waters’*, at p. 914). As stated by F. M. B. Reynolds in *Bowstead and Reynolds on Agency* (17th ed. 2001), at para. 6-057, “[t]he duty does not completely prohibit the adoption of a position or the entering into of transactions in which such a conflict might occur; it rather prohibits doing so without disclosure of all material facts to the principal so as to obtain his consent” (emphasis added). Here, the principal had consented to the agent’s conflict of interest — to act for other principals competing in the same market — and knew that the agent would be simultaneously acting in the interests of the principal and competitors. The first question that Wedge J. ought to have asked, therefore, was whether the Compensation Differences constituted a material fact or information beyond what had already been disclosed, such as to impose a fiduciary duty upon VAC to disclose their particulars.
3. The standard for identifying when a conflict of interest exists in a fiduciary context was discussed by this Court in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631. There, Binnie J. dealt with conflicts of interest arising out of the solicitor-client fiduciary relationship. He set out the following standard for identifying when a lawyer is in a position of conflict of interest:

 I adopt, in this respect, the notion of a “conflict” in § 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45, as a “substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person”. [Emphasis added; para. 31.]

1. The essential first step was for the court to determine if the Compensation Differences constituted material facts or information beyond what had already been disclosed, thereby giving rise to a fiduciary duty for VAC to disclose them and obtain consent. In this regard, VAC submits that “[a]ll of the evidence on the issue of materiality that [it] adduced, and that the trial judge disregarded, was therefore as relevant to determining the existence of a conflict of interest as it was to determining whether [it] had made a misrepresentation in the [Hilton Disclosure Statement]” (R.F., at para. 106).
2. This is essentially correct, except for one qualification. It must be remembered that the fiduciary duty issue is distinct from the misrepresentation issue. The materiality evidence and analysis carried out with respect to Sharbern’s claim that VAC made material false statements attracting statutory liability under the *Real Estate Act* related to the time period during which the Hilton strata units were marketed and sold. VAC’s disclosure obligations under its fiduciary duty related to matters existing or arising during its role as manager of the Hilton hotel. This requires a consideration of the time period following the Hilton Disclosure Statement and also the time period covering the later stages of the fiduciary relationship.
3. The Hilton Disclosure Statement was issued in February 1998, and the hotel opened for business in June 1999. VAC had disclosed in the Hilton Disclosure Statement its management of the Marriott hotel and the similar and additional agreements it had with that hotel, “all of which give rise to certain liabilities and obligations of the Developer which could impact upon its ability to perform its obligations under the Agreements” (art. 4.9(i)). I place no significance on VAC’s description of itself as “Developer” instead of “manager” in this context, as the former would have been the term by which it was defined in the Hilton Disclosure Statement. As found by the trial judge, “the Hilton Owners consented to VAC acting for other principals competing in the same market” (para. 425). I agree with Chiasson J.A.’s observation that the question is invariably reduced to whether the Compensation Differences were material, thereby obliging VAC to disclose them and obtain the Hilton Owners’ consent to those details. It is also necessary to inquire whether circumstances changed during the course of the fiduciary relationship such as to require VAC to make additional disclosures and obtain renewed consent.
4. The materiality of the Compensation Differences when the investors were making their decision to invest has been dealt with in detail in the discussion of VAC’s alleged statutory liability under the *Real Estate Act*. However, I would add that the disclosure obligations with respect to VAC’s fiduciary duty are different from the disclosure obligations under the *Real Estate Act*. As a fiduciary, VAC was obligated to disclose any material facts or information, such as if there was a substantial risk that VAC’s fiduciary relationship with the Hilton Owners would be materially and adversely affected by VAC’s own interests or by VAC’s duties to another (*Neil*,at para. 31). VAC’s statutory duty was simply to disclose to investors certain prescribed information, without making material false statements. Nonetheless, in that regard, much of the evidence about the materiality of the Compensation Differences as it related to VAC’s alleged statutory liability under the *Real Estate Act* would also have been relevant to the question of materiality under the fiduciary duty analysis.
5. VAC submitted extensive evidence in support of its position that its lack of disclosure of the Compensation Differences in the Hilton Disclosure Statement did not constitute a material false statement under the legislation. There is no need to repeat that evidence here, which has been discussed in detail above. However, I would add that, in the context of proving or disproving the alleged breach of fiduciary duty, the parties are not precluded from bringing evidence that did not form part of the total mix of information available to investors at the time of their investment decisions, or evidence that would not have been available through the Hilton Disclosure Statement.
6. For example, the evidence with respect to an industry practice of common management of competing hotels that was considered in relation to VAC’s statutory defence is, in my view, also relevant to the question of whether the Compensation Differences were material in the context of the claim of breach of fiduciary duty. After all, the fiduciary relationship arose in the context of a disclosed conflict of interest of common management, and a reported practice of common management of competing hotels by VAC’s related companies. Beyond the testimony of VAC’s witnesses that common management of competing hotels took place without disclosure of the contractual terms to the different owners, it seems highly unlikely that management agreements negotiated between different parties at different times would have identical terms. This case yields one example, where the guaranteed rate of return offered to Marriott Owners apparently could not be offered in the Hilton Disclosure Statement a year later because of changes in securities laws. The fact that common management was nonetheless an accepted industry practice for different hotel chains in the same market suggests that industry players did not treat differing management compensation arrangements as material to the efficient operation or profitability of the hotels. Such evidence would have been relevant to the trial judge’s consideration of the materiality of the Compensation Differences.
7. In contrast to the evidence adduced by VAC, Sharbern did not provide any evidence as to the materiality of the Compensation Differences in this context. Nor did the trial judge consider all the evidence submitted by VAC in her assessment of the materiality of the financial incentives. Although the misrepresentation issue is distinct, the error seen in relation to that analysis applies equally to the analysis of the issue of whether VAC was liable for breach of fiduciary duty. The party seeking to establish the materiality of the undisclosed facts or information did not provide evidence upon which a finding of materiality could reasonably have been made.
8. The fiduciary relationship also existed during the later period of time, during which VAC was managing the Hilton hotel. The Hilton hotel opened in June 1999. VAC disclosed the existence of the guarantee in favour of Marriott Owners in a meeting with Hilton Owners on June 14, 2000. The timing of the disclosure of the differential in management fee is not clear. At some point, when the economy deteriorated and occupancy rates plummeted, the Compensation Differences potentially became more germane. So too would VAC’s retention of the 24 strata lots in the Hilton hotel, at least in the eyes of Marriott Owners. VAC could then have had a renewed obligation to disclose what had arguably developed into a material conflict of interest, assuming a rejection of VAC’s arguments that it lacked the practical means and incentive to act upon the Compensation Differences. How did the timing of these events compare to the timing of the June 2000 disclosure of the guaranteed rate of return to Marriott Owners? Did the conduct of the Hilton Owners subsequent to disclosure constitute consent, at least until the filing of the plaintiff’s statement of claim in June 2003 or perhaps when they sought legal advice in the fall of 2002? Evidence on these considerations is not before us, and did not form part of the record before the trial judge.
9. In sum, not only did the trial judge not consider all the evidence relevant to the issue of materiality, there was a failure on the part of the plaintiff to adduce evidence on the issue of the materiality of the Compensation Differences, either at the time of the Hilton Disclosure Statement or during the later stages of the fiduciary relationship. I am of the opinion that Sharbern failed to demonstrate that the Compensation Differences constituted a material fact or information beyond what had already been disclosed by VAC. Also, as found in the analysis of the misrepresentation issue, the trial judge’s conclusions on the issue of breach of fiduciary duty were tainted by an expectation that VAC must disprove, rather than Sharbern satisfy its onus of proving, the materiality of the Compensation Differences. These problems loom large over the consideration of whether to remit the matter to the trial judge for a determination on the issue of the materiality of the Compensation Differences for the purpose of assessing VAC’s liability for breach of fiduciary duty.

 (5) The Non-Competition Agreement

1. Apart from the non-disclosure of the Compensation Differences, Sharbern submits that it was a breach of VAC’s fiduciary duty for VAC to direct its staff at the Hilton not to engage in price competition with the Marriott.
2. The trial judge observed that VAC implemented a “non-competitive pricing policy which prevented the [Hilton, Marriott and Richmond Inn] from undercutting each other’s room rates” with respect to the top ten corporate preferred accounts of each hotel (para. 161). The policy was implemented shortly after the Hilton’s 2002 budget was put in place. She found that “[u]nder the policy, both the Hilton and the Marriott were constrained, but the *status quo* favoured the Marriott” as the Hilton was “trying to close the gap” (para. 454) that the Marriott had obtained because of a “year’s head start by the time the Hilton opened” (para. 448).
3. Irrespective of the merits of the contract, the trial judge held that it was a breach of fiduciary duty for VAC to commit the Hilton Owners to a price competition agreement with the Marriott Owners in the absence of the former’s consent.
4. VAC argues that the evidence at trial established that the price competition policy was not a manifestation of a conflict of interest as a matter of fiduciary law. It says that the policy was in the best interests of both the Hilton and the Marriott Owners. For example, the general manager of the Marriott hotel, James Nesbitt, testified that the Marriott would have matched prices with the Hilton if necessary to retain any business that the Hilton hotel might have attempted to poach by underbidding. He observed that undercutting on price was “not a strategy that works at all” (R.R., vol. 11, at p. 2102). When asked about his experience with customers threatening to move hotels because of lower rates, Nesbitt testified that “in all cases - - because it’s much easier to retain an existing customer, than spend a lot to go out and find a new customer, in every case you would match that rate to make sure you kept the business” (*ibid.*, at p. 2104).
5. First, I cannot agree with the trial judge’s conclusion that it was a breach of fiduciary duty for VAC to enter into agreements with the Marriott Owners on behalf of the Hilton Owners without prior consent. With three hotels located on the same property, connected by a shopping concourse, and managed through common management, agreements entered into by VAC on behalf of and between Hilton Owners and Marriott Owners would have been part of the ordinary course of business, as day-to-day matters that could not feasibly require prior consent of all Hilton Owners. Agreements to effect the sharing of common resources and expenses mentioned earlier would be one example. Significantly, the Hilton Disclosure Statement provided that VAC had the right to enter into such agreements. As stated at art. 4.4(b):

 . . . the Asset Manager shall have the right to enter into such agreements and contracts, and to do such acts and things, as the Asset Manager, in its discretion, considers necessary or desirable, including without limitation entering into affiliation, management, reservation, marketing agreements or licensing or franchise agreements with a hotel chain.

1. Second, the trial judge erred by failing to consider evidence which was relevant to the materiality of the non-competition agreement, such as evidence of other effects of common management and their impact on the Hilton Owners. Wedge J. simply saw the non-competition agreement as proof of the potential conflict of interest created by common management, commenting that “[t]he highly competitive hotel industry does not embrace the notion of even-handedness” (para. 303). She ignored other evidence to the effect that the three hotels also shared business with each other. VAC’s evidence indicated that the Marriott referred business to the Hilton or the Richmond Inn when it did not have the capacity or did not wish to accommodate the lower room rate requested by the client. When the Marriott did not have the capacity to accommodate all the Cathay Pacific air crews, it negotiated a contract which gave a portion of the Cathay Pacific business to the Hilton. In my view, the trial judge erred in assessing the materiality of the non-competition agreement to Hilton Owners without determining, on the totality of evidence, whether it was part of an overall practice of cooperation that was to the ultimate benefit of the three hotels.
2. In sum, without proof that the non-competition agreement constituted a material fact or information beyond what had already been disclosed by VAC, I cannot accept that the non-competition agreement constituted a breach of fiduciary duty.

VI. Summary and Conclusions

1. In view of the length of these reasons, it will be useful to summarize my conclusions at this point.
2. As to VAC’s liability for material false statements under the *Real Estate Act*:

1. The key question for liability under s. 75(2) of the *Real Estate Act* was to determine if the Compensation Differences were material. Except in cases where materiality can reasonably be established through common sense inferences, materiality must be proven through evidence, and is a fact-specific inquiry, determined on a case-by-case basis. Investors do not have to prove that the undisclosed information would have changed their decision to invest. However, they must prove a substantial likelihood that it would be considered important by a reasonable investor in making an investment decision. That is, there must be a substantial likelihood that a reasonable investor would consider the fact as having significantly altered the total mix of available information.

2. The trial judge made three errors in her materiality assessment. First, she treated the conflict of interest as inherently material; second, she reversed the onus of proof of materiality; and, third, she did not consider all of the evidence available to her on the issue of materiality.

3. The onus was on Sharbern to prove that the Compensation Differences were material. It did not adduce any evidence which could reasonably do so.

4. Even if VAC were found to have made a “material false statement”, the statutory defence found in s. 75(2)(b)(viii) of the *Real Estate Act* would have availed to its benefit. The trial judge erred by not considering this defence. The statutory defence was established. VAC led evidence to show that it subjectively believed and had reasonable grounds for believing that the Compensation Differences were not material. Sharbern did not direct this Court to any evidence to the contrary.

5. The presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase.

1. As to VAC’s liability for negligent misrepresentation, the trial judge erred by not considering whether VAC breached the standard of care. As there was no evidence capable of supporting a finding of breach of standard of care, VAC cannot be held liable for negligent misrepresentation.
2. As to VAC’s liability for breach of fiduciary duties:

1. When VAC began acting as manager under the Hotel Asset Management Agreement, a fiduciary relationship arose between VAC and Sharbern (and the other Hilton Owners).

2. VAC had already disclosed, and the Hilton Owners had consented to, VAC’s common management of the Hilton and the Marriott hotels. Therefore, that conflict of interest was not a breach of VAC’s fiduciary duty. VAC was only obliged to disclose the Compensation Differences if they constituted material facts or information beyond what had already been disclosed. Sharbern did not adduce evidence to establish the materiality of the Compensation Differences. Additionally, the trial judge erred by reversing the onus of proof of materiality and by not considering all the evidence adduced by VAC relevant to the issue of materiality.

3. The trial judge erred by not assessing the materiality of the non-competition agreement, and Sharbern did not adduce evidence to establish its materiality.

1. I am mindful of the time and resources expended by the parties in the eight years since this litigation commenced. It cannot be in the interests of justice or the parties to prolong the matter further than necessary.
2. Had I not found that Sharbern had failed to adduce any evidence to establish the materiality of the Compensation Differences or that VAC could claim the benefit of the statutory defence under s. 75(2)(b)(viii) of the *Real Estate Act*, I would have considered remitting the matter to Wedge J. for a determination of the issues in consideration of all the relevant evidence and in accordance with these reasons. However, she would be placed in the position of reassessing the issues upon a consideration of a wider swath of evidence, all in support of only VAC, without any evidence to support the position of Sharbern. The same dilemma arises if she is directed to reconsider whether VAC breached its fiduciary duty to the Hilton Owners by failing to disclose the Compensation Differences during the course of its management of the Hilton hotel.
3. Cases such as *Hollis v. Dow Corning Corp*. have discussed the circumstances under which it is appropriate for an appellate court to make a fresh assessment of the evidence on the record. Whether the appellate court should do so will depend upon what is in the interests of justice, and whether a fresh assessment is feasible on a practical level. Feasibility often depends upon the extent to which the credibility of witnesses is at issue as opposed to a consideration of documentary evidence. I am mindful that this case involved a two-month trial, which included much *viva voce* evidence. However, none of the findings of fact by the trial judge appear to be predicated upon her assessment of the credibility of witnesses.
4. It has been a recurring finding throughout my consideration of the issues in this case that Sharbern failed to adduce evidence to support key aspects of its claims. As plaintiff, Sharbern had the burden of proving all the necessary elements of its claims, on a balance of probabilities. Sharbern was given the opportunity of a two-month trial to produce such evidence. Nonetheless, it failed to lead sufficient evidence to discharge its onus with respect to establishing the requisite breach of the standard of care necessary to its claim of negligent misrepresentation.
5. It also failed to produce evidence in support of the materiality of the Compensation Differences, both with respect to whether a failure to disclose them resulted in (i) a material false statement attracting liability under the *Real Estate Act*, or (ii) a breach of its fiduciary duty to the Hilton Owners as the manager of the Hilton hotel. The first may have been due to its position argued in this Court that “there is no need for a plaintiff to tender industry or expert evidence as to what would influence a reasonable investor because the question of materiality of conflicts of interest in a prospectus is uniquely for the court” (A.F., at para. 40). As I said previously, this position misapprehended the fact-based inquiry that is required in order to establish materiality, as well as the onus on a plaintiff to adduce evidence in support of materiality. Sharbern’s failure to adduce evidence of materiality in the context of the claim of breach of fiduciary duty may similarly stem from a misapprehension of the principle that there is only a duty to disclose material facts or information.
6. This Court is in the same position as was the Court of Appeal, which signalled throughout its reasons for judgment that the plaintiff had failed to adduce objective evidence to support its claims. In my opinion, the evidence before the trial court could not support a finding that VAC was liable under the *Real Estate Act*, for negligent misrepresentation or for a breach of fiduciary duty either for failing to disclose the Compensation Differences or in implementing the non-competition policy.
7. I would dismiss the appeal. Leave to appeal in this matter was granted with costs in the cause. Section 37 of the British Columbia *Class Proceedings Act* establishes a no costs regime in the trial court and the Court of Appeal. However, that statute does not apply to this Court. The respondents are entitled to their costs in this Court.

 *Appeal dismissed with costs.*

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