

CANADA / JUDGMENT

Dubois v. Milne

2020 BCCA 216

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 216 Dubois v. Milne

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dubois v. Milne,

2020 BCCA 216

Date: 20200724

Docket: CA45661

Between:

Kelvin Dubois

Respondent

(Plaintiff)

And

Carey Milne

Appellant

(Defendant)

And

Lucid Distributors Inc.

Respondent

(Defendant)

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia,
dated September 14, 2018 (Dubois v. Lucid Distributors Inc.,
2018 BCSC 1582, Vancouver Docket S125437).

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Place and Date of Hearing:

Vancouver, British Columbia

June 10, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 24, 2020

Written Reasons by: (p. 26, para. 102)

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Madam Justice Fisher

Concurring Reasons by:

The Honourable Chief Justice Bauman

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Summary:

The appellant challenges an order pursuant to s. 227 of the Business Corporations Act, S.B.C. 2002, c. 57 declaring that the affairs of Lucid Distributors Inc. have been conducted, or the powers of its directors have been exercised, in a manner oppressive or unfairly prejudicial to the respondent Kelvin Dubois, and compelling the appellant to purchase Dubois's shares in Lucid. The appellant argues the judge erred in finding oppression relief available in the circumstances, in concluding Dubois's expectations were reasonable, and in ordering the appellant to personally purchase the shares. Held: Appeal dismissed. Oppression relief under s. 227 is available notwithstanding the existence of other overlapping rights. Per Groberman J.A. (Fisher J.A. concurring): The judge did not err in finding that Mr. Milne acted oppressively in causing the company to refrain from paying dividends in a timely manner and in causing his own remuneration to be substantially increased. While his finding that the termination of Mr. Dubois's employment was oppressive was in error, his order was nonetheless sustainable on the remaining findings of oppression. The remedy granted by the judge was within his discretion. Per Bauman C.J.B.C.: The judge did not err in characterizing Mr. Milne's conduct as oppressive, including his conduct in terminating Mr. Dubois's employment.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. Overview

- [1] Kelvin Dubois holds a 45% interest as a shareholder in Lucid Distributors Inc., a wholesale distributor of pet food and supplies. His shares are non-voting. The voting shares and effective control of Lucid rest in Carey Milne, a friend of Dubois's until the events giving rise to this litigation intervened.
- [2] Kelvin Dubois was the general manager of Lucid until he was terminated from that position by Carey Milne in January 2011.
- [3] Kelvin Dubois alleged that Carey Milne during and after Dubois's termination conducted the affairs of Lucid in a manner oppressive or unfairly prejudicial to him as a shareholder. Dubois brought proceedings against Lucid and Milne under s. 227 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA].

- [4] After a nine-day trial, a judge of the Supreme Court agreed that Milne had engaged in oppressive conduct. The judge ordered Milne to purchase Dubois's shares at a value to be determined as of the date of the petition, 1 August 2012.
- [5] Milne appealed. He argues for the first time in this Court that Dubois's complaints, if made out, nevertheless do not properly found an oppression claim.
- [6] He argues in the alternative the trial judge erred (in a palpable and overriding fashion) in finding that Dubois's expectations, so found by the judge, were reasonable.
- [7] He finally argues that the remedy imposed by the judge, requiring the purchase of Dubois's shares, should be the responsibility of Lucid, not Milne.
- [8] I conclude none of these arguments undermine the trial judge's conclusions. I would dismiss the appeal and now set down my reasons for so doing.

II. Background

- [9] Lucid was incorporated by Carey Milne in 1996. In 1997, Dubois and his then-spouse Sharon MacKay were approached by Milne (whom Dubois had met four years earlier) with a proposal that they purchase 100 Class B non-voting common shares in Lucid. They would each thereby own 5% of Lucid's shares and proportionally share in its net income. They each agreed to purchase 5% of the shares. Dubois was not employed by Lucid at the time he acquired his shares.
- [10] In late 1997, Lucid required additional working capital for inventory. In November of that year, this led to an investment of \$40,000 by W. Son's Enterprises Ltd. ("W. Son's"). It thereby acquired 800 Class C non-voting shares and an entitlement to 40% of Lucid's net income. W. Son's insisted upon having a shareholders' agreement in place and it was drafted and executed by all including Dubois and MacKay (the "Shareholders' Agreement" or "Agreement").
- [11] I would note some of the clauses in that agreement relevant to submissions made on appeal:
- It is recited that "[t]he parties wish to enter into this Agreement in order to define their respective rights and obligations with regard to the Company";
 - Milne is appointed as "Manager of the Business" with these duties (clause 2.2):
- the Manager will:
- (a) manage, operate, direct, and superintend the Business;
 - (b) hire, train, employ, and supervise at the expense of the Company, all persons necessary to operate the Business;
 - (c) pay all trade creditors of the Company in a reasonably prompt manner;

- (d) keep such books of account and records as may be necessary, and correctly enter therein any and all monies received and disbursed in the operation of the Business; and
- (e) have the authority to contract for expenditures in the ordinary course of the business of the Company.

· Milne's "Management Fee" was (clause 2.3) "set initially at the amount of \$4,000 per month for a period of one year from the date of this Agreement, and thereafter at the discretion of the Board to a maximum of \$5,000 per month"; and

· The shareholders were entitled to discuss prior to various "major decisions" including "any change in the amount of the Management Fee" (clause 2.5(o)).

[12] In March 1998, Milne approached Dubois and invited him to come to work with Lucid. Dubois did so.

[13] By 2000, Dubois was the General Manager and Purchasing Manager of the business; Milne was President and Chief Financial Officer.

[14] Also in 2000, W. Son's ended its investment in Lucid and sold its shares back to Milne. On 29 June 2000, Milne sold W. Son's shares to Dubois. Dubois then had a 45% interest in Lucid.

[15] Dubois's relationship with Milne in the context of Lucid, and this investment in the company, led to certain findings by the trial judge, which I will detail below.

[16] The business grew in the following years and until 2006 Lucid paid out all of its net income as quarterly dividends (after corporate taxes) proportionately to all shareholders.

[17] In 2006 it was decided that Lucid should begin to retain earnings to build up the capital base to support Lucid's growth through inventory, equipment and other operating expenses. Retained earnings increased substantially over the ensuing years. As a result of this, not all net profits were paid out to the shareholders as dividends.

[18] At this time as well Milne began to work less frequently, generally coming into Lucid's offices only a couple of days per week. Dubois increasingly took a greater role in daily operations of the company; accordingly, his salary was increased to \$100,000 per annum in 2009. Milne's salary remained at \$60,000 per annum.

[19] In 2009 Milne was hospitalized for a period of time. He returned to work in 2010 and expressed the wish to reassert control over the business. Dubois acquiesced. Unfortunately, at this time Milne's attitude towards Dubois changed fundamentally. No reason for this is apparent in the record. This eventually resulted in Milne terminating Dubois's employment with Lucid in January 2011.

[20] In a letter outlining the reasons for termination, Milne alleged that he had provided Dubois "copious" verbal notice regarding Dubois's performance.

- [21] Milne later conceded that no such notice had been given. Dubois brought a wrongful dismissal action. It was settled in 2016.
- [22] At this time Milne was President of Lucid.
- [23] By a consent resolution of 25 October 2010, Milne, as sole director of the company, appointed himself as Chief Financial Officer at an annual salary of \$100,000, increased from his previous salary of \$60,000 annually.
- [24] By a similar resolution of 11 January 2011, Milne approved an additional annual salary for himself as President of \$50,000.
- [25] By a similar resolution of 1 April 2012, Milne appointed himself Director of Purchasing at an annual salary of \$75,000.
- [26] Notwithstanding the dividend history of Lucid (even after 2006), no dividends were declared for the fiscal years ending 30 June 2010 and 30 June 2011.
- [27] On 1 August 2012, Dubois commenced the underlying action in this matter by petition.
- [28] He sought, among other orders, relief from oppression under s. 227 of the BCA, in particular an order directing either Carey Milne or the company to purchase or redeem Dubois's shares in Lucid for an amount determined by a valuator.
- [29] By consent the matter was referred to the trial list on 2 March 2017.

III. Judgment at Trial

- [30] Section 227(2) of the BCA establishes the oppression remedy:
- (2) A shareholder may apply to the court for an order under this section on the ground
- (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
- (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.
- [31] The judge summarized the allegedly oppressive conduct of Milne at para. 153 of his reasons. It included the termination of Dubois and Milne's failure to purchase his shares in Lucid; the improper removal of funds from Lucid (through the additional salaries attached to the positions to which Milne appointed himself); and the failure to pay dividends to Dubois.
- [32] After reviewing the evidence at trial and the positions of the parties the judge began his analysis and decision at para. 212 of his reasons.

- [33] The judge referred to and quoted at length from the seminal authority on the oppression remedy, the Supreme Court of Canada's decision in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69.
- [34] In particular the judge noted that the oppression remedy deals with the "expectations" of the affected shareholders. "The reasonable expectations of the shareholders is the cornerstone of the oppression remedy" (at para. 216 quoting *BCE* at para. 61).
- [35] The judge reproduced the factors described in *BCE* that guide the determination of reasonable expectations (at para. 217) namely:
- (i) general commercial practice
 - (ii) the nature of the corporation;
 - (iii) the relationship between the parties;
 - (iv) past practice;
 - (v) steps the claimant could have taken to protect itself;
 - (vi) representations and agreements; and
 - (vii) the fair resolution of conflicting interests between corporate stakeholders.
- [36] The judge then advanced to his assessment of the credibility of the witnesses. He formed a very unfavourable view of Carey Milne in contrast to his finding Dubois "to be a forthright and credible witness" (at para. 247). As for Milne, the judge concluded (at paras. 248-250):
- [248] Milne, based on all the evidence, clearly became very controlling after his hospitalization and began to micromanage Lucid. He made disparaging comments about Dubois after his hospitalization and avoided Dubois.
- [249] Milne, in my view, pushed Dubois out of Lucid in an effort to maintain control of that company. An example of Milne's need for control was his actions in influencing what some of the witnesses said when they made their affidavits.
- [250] For all of the above reasons, where the evidence of Milne is in conflict with that of Dubois, I accept the evidence of Dubois.
- [37] The judge then turned to consider the reasonable expectations of Dubois noting that he shouldered the onus of establishing what his subjective expectations were and that those expectations were objectively reasonable citing *BCE* at para. 70 and *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193.
- [38] The judge concluded (at para. 267):
- [267] Based on a review of the evidence I make the following findings with regard to Dubois' reasonable expectations:

- a) Dubois had a reasonable expectation that he would receive 45% of the net income after taxes from Lucid including for fiscal years ending June 30, 2010 and June 30, 2011.
 - b) Dubois had a reasonable expectation that not only was he a 45% owner of Lucid, but that he would have a role in Lucid's management.
 - c) Dubois had a reasonable expectation that he would have employment with Lucid for as long as he had shares in Lucid.
 - d) Dubois had a reasonable expectation that Milne's salary would be restricted to \$60,000 per year based on the Agreement.
- [39] The judge considered the jurisprudence discussing the nature of "oppressive and unfairly prejudicial conduct". He cited *Urquhart v. Technovision Systems Inc.*, 2002 BCSC 172, aff'd 2003 BCCA 45 and quoted (in part) para. 35 thereof:
- [35] The law that governs what can be said to be "oppressive" and what can amount to "unfair prejudice" has not developed with great clarity. Generally, founded on what Viscount Simon said in *Scottish Co-op Wholesale Soc. Ltd. v. Meyer*, [1958] 3 All E.R. 66 at 71, "oppression" has been said to mean conduct that is burdensome, harsh and wrongful or, following what Lord Keith said at p. 86, it is said to mean conduct that lacks probity and fair dealing in the affairs of the company to the prejudice of some of its members. "Unfairly prejudicial" has been distinguished as having a broader meaning protecting a wider range of rights, but it has not been, and perhaps cannot be, as well defined.
- [40] I reproduce these critical conclusions of the judge:
- [269] Dubois' reasonable expectations that he would participate in the management of Lucid and that he would have employment with Lucid as long as he was a shareholder were contravened by the actions of Milne in wrongfully terminating Dubois' employment.
- [270] Wrongful dismissal by itself will not justify a finding of oppression. It is only where the interests of the employee are closely intertwined with his interest as a shareholder, and where the dismissal is part of a pattern of conduct to exclude the complainant from participation in the corporation, that the dismissal can be found to be an act of oppression: *Krynen v. Bugg* (2003), 64 O.R. (3d) 393 (S.C.J.) at para. 74.
- [271] Milne wanted not only Dubois' money in purchasing the shares in Lucid, but also his ability and skills. Dubois considered himself on an equal footing to Milne and I infer, based on the evidence, that up until 2010, Milne shared the same view.
- [272] Dubois' interests as an employee were closely intertwined with his interest as a shareholder. Dubois worked long hours and conducted himself as an owner would.
- [273] In my view the wrongful dismissal of Dubois establishes a finding of oppression on its own.

[274] Further, Milne tripled his salary after Dubois was terminated. This was contrary to the Agreement and there was no precedent in the operation of Lucid to justify this. Based on the evidence, I find that Milne increased his salary for the specific purpose of depriving Dubois of the dividends he was entitled to.

[275] Milne wrongfully withheld dividends from Dubois, again for the purpose of forcing Dubois out of Lucid.

[276] In my view, these two further grounds would establish a finding of oppression on their own. However, I am confident that the cumulative effect of these actions by Milne clearly establishes oppression on his part against Dubois.

[41] Turning to the remedy, the judge concluded that Milne should be required to purchase Dubois's shares:

[285] Taking into account the delay in bringing this matter to trial, the excessive amounts that Milne took as a salary and Lucid's current economic situation, in my view the appropriate date to value Dubois' shares is the date the petition was filed on August 1, 2012.

IV. Issues on Appeal

[42] On appeal, Carey Milne submits the judge erred:

1. In relying on expectations entailing the assertion of private, contractual rights and obligations that are not protected by the oppression remedy;
2. Alternatively, by making palpable and overriding errors in finding that the expectations held by Kelvin Dubois were reasonable; and
3. Alternatively, by ordering that Kelvin Dubois's shares be purchased by Carey Milne rather than by Lucid.

[43] The first issue goes to Dubois's threshold entitlement to an oppression remedy. It was not argued at trial and Dubois submits that it should not be entertained for the first time in this Court. I will resolve this aspect of the argument below.

[44] Essentially, Milne submits that even if Dubois reasonably expected to enjoy continued employment so long as he was a shareholder in Lucid, a breach of that "expectation" would be a matter for a wrongful dismissal action, an action Dubois has already pursued in other proceedings. It would not found an oppression remedy.

[45] Similarly, it is said that any expectation Dubois had for the payment of annual dividends and a cap on Milne's salary would be actionable through breach of contract proceedings or in a derivative action.

[46] On the second issue, Milne submits the judge committed palpable and overriding error in his assessment of reasonable expectations giving rise to relief for oppressive conduct. First, he argues it was erroneous to conclude Dubois had a reasonable expectation of employment

as long as he was a shareholder, as such an expectation was not supported in any form of contract. He further submits that there was a rational and credible reason for Dubois's firing--the relationship between him and Milne--that should be protected by the business judgment rule. Second, Milne submits it was erroneous to conclude Dubois had a reasonable expectation of receiving dividends in 2010 and 2011, as Lucid was legitimately entitled to not issue dividends when this was in its best interests. Third, Milne submits it was an error to find a reasonable expectation that Milne's salary would remain at \$60,000 per year, his appointment to additional salaried positions was permitted by the Shareholders' Agreement and the increase was a reasonable response to him taking on Dubois's work.

- [47] Finally, on the third issue, Milne submits the judge went further than necessary in ordering that Milne, rather than Lucid, purchase Dubois's shares. He submits that, in accordance with s. 227(3) of the BCA, the remedy should be ordered "with a view to remedying or bringing to an end the matters complained of". Because Dubois continued to accept payments of dividends from Lucid from 2014-18, he argues, the order requiring his shares be purchased should have been against Lucid, not Milne; the judge erred in not taking the "crucial idiosyncrasy" of the 2014-18 payments into account.

V. Analysis

- [48] No issue is taken with the standard of review of the trial judge's conclusions here. His findings with respect to "reasonable expectations" are to be reviewed on a deferential standard of palpable and overriding error. His exercise of discretion on remedy also attracts deference: *Radford v. MacMillan*, 2018 BCCA 335 at para. 54. But the threshold issue of the availability of the oppression remedy in the circumstances raises a question of law for which correctness is required: *Jaguar Financial Corporation* at para. 63.

A. The Judge Did Not Err in Concluding Oppression Relief Was Available in the Circumstances

- [49] Turning to that threshold issue, Dubois argues that the availability of oppression relief was not raised below and should not be considered on appeal, citing *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at paras. 44-46 in support. I would not gainsay anything said on this issue in that case, but of course it is a matter of discretion in any particular case whether this Court will hear new arguments advanced for the first time on appeal.
- [50] Here, applying the considerations adopted in *Gorenshtein*, while the issue is "new" it flows naturally from the essential position always advanced by Milne, the evidentiary record is fully sufficient, and no discernable prejudice to Dubois is identified. I will advance to consider the argument.

- [51] In my view, Milne's submission adopts a too narrow view of the oppression remedy. The Supreme Court of Canada in *BCE* did repeat the words of Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), that is (at para. 61):
- [61] Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the CBCA. It is left for the oppression remedy to deal with the "expectations" of affected shareholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.
- [52] However, I do not take that statement to preclude the possibility that delicts that might otherwise be individually actionable at law cannot in equity feed a finding of reasonable expectation and oppressive and unduly prejudicial conduct. Indeed, the BCE court acknowledged this in para. 58 of its reasons:
- [58] First, oppression is an equitable remedy. It seeks to ensure fairness - - what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R.(2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, *Koehnen*, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.
- [Emphasis added.]
- [53] Two leading cases in this province make the point expressly.
- [54] In *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2011 BCCA 228, Justice Newbury (for the Court) concluded that a breach of fiduciary duty may well overlap with oppressive or unfairly prejudicial conduct, and it may assist in so characterizing particular conduct (at para. 71) (see also *Radford v. MacMillan* at para. 67).
- [55] To a similar effect is Justice Newbury's discussion of the remedy in *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, 2016 BCCA 258 at para. 54:
- [54] In summary, while oppression is a "personal" claim, not every personal claim that a shareholder may assert against a corporation will constitute oppressive or unfairly prejudicial conduct. The oppression or unfair prejudice must generally be suffered by the "shareholder" (as defined) qua shareholder: see *Dilligenti v. R.W.M.D. Operations Kelowna* (1976) 1 B.C.L.R. 36 (S.C.) at 41; *Burdeny v. K & D Gourmet Baked Foods & Investments Inc.* (1999) 48 B.L.R. (2d) 16 (B.C.S.C.) at para. 20; *Safarik v. Ocean Fisheries Ltd.* (1995) 12 B.C.L.R. (3d) 342 (C.A.) at para. 85; *Stone v. Stonehurst Enterprises Ltd.* (1987) 80 N.B.R. (2d) 290 (Q.B.) at 305, quoted with approval in *Naneff v. Con-Crete Holdings Ltd.* (1995) 23 O.R. (3d) 481 (C.A.) at 489. On the other hand, as *Naneff* illustrates, where the complainant is able to show an entire course of oppressive conduct which includes another cause of action (in

Naneff, wrongful dismissal), that cause may also be remedied under the oppression provision.

[Emphasis in original.]

- [56] The wrongful dismissal action brought by Dubois sought damages for his loss of earnings. In this action, on the contrary, he seeks a remedy in respect of the frustration of his expectations as a shareholder. While the conduct--the termination of his employment--overlaps, the remedies and the capacity in which Dubois pursues each are different.
- [57] The judge was clearly aware of the danger of letting a purely contractual claim found an oppression remedy. At para. 270 of his reasons the judge said:
- [270] Wrongful dismissal by itself will not justify a finding of oppression. It is only where the interests of the employee are closely intertwined with his interest as a shareholder, and where the dismissal is part of a pattern of conduct to exclude the complainant from participation in the corporation, that the dismissal can be found to be an act of oppression: *Krynen v. Bugg* (2003), 64 O.R. (3d) 393 (S.C.J.) at para. 74.
- [58] Overarching Milne's submissions on the availability of oppression relief is the argument that Dubois did not demonstrate that he suffered "direct and special", "peculiar", or "separate and distinct" harm from that suffered by all the shareholders as required by the cases (see e.g., *Jaguar Financial Corporation* at para. 179). He argues that a derivative action, and not an oppression claim, would be a more appropriate means of pursuing relief.
- [59] I cannot agree. The termination of Dubois clearly represents distinct harm in the context of his singular expectations as a shareholder with a 45% interest in Lucid. Further, while the only shareholder apart from the parties--MacKay--suffered the other harms, Milne clearly did not and Dubois need not be the only shareholder oppressed: *Jaguar Financial Corporation* at para. 179.
- [60] In my view, this alleged error going to the threshold availability of the oppression remedy here cannot be sustained.

B. The Judge Did Not Err in Finding Dubois's Expectations Reasonable

- [61] Then it is submitted that the judge erred in concluding that Kelvin Dubois's expectations were objectively reasonable.
- [62] However, Milne's submissions founder on the express findings of fact made by the judge.
- [63] I reiterate the judge's findings: Dubois reasonably expected to continue to be employed in Lucid and play a role in its management, to receive dividends reflecting Lucid's income, and that Milne's salary would be restricted to the \$60,000 provided by the Shareholders' Agreement. The expectation with respect to Dubois's role in management received little attention in the parties' submissions and I will consequently not address it here.

[64] These findings, again, are entitled to deference and should not be overturned absent palpable and overriding error.

[65] I have summarized Milne's submissions on this issue at para. 47 of these reasons, above. I will first address arguments with respect to the expectation of ongoing employment, and then discuss the arguments with respect to dividends and salary.

1. Employment Expectation

[66] First, with respect to the expectation of continuing employment, Milne says that the Shareholders' Agreement does not guarantee Dubois's ongoing employment. Consequently, Milne submits, the judge committed palpable and overriding error in concluding the employment expectation was reasonable.

[67] It is certainly true that the Shareholders' Agreement, signed when Dubois purchased his first 5% of shares in Lucid and before he became employed or purchased an additional 40% of those shares, did not promise Dubois ongoing employment. And it is unquestioned that no other contract promised Dubois his employment with Lucid would continue indefinitely (though, of course, the law of employment did preclude him being wrongfully dismissed).

[68] But to say the absence of a promise justifying the expectation precludes oppression relief ignores the nature of and guiding principles behind the remedy. A reasonable expectation in the law of oppression is not a contract. There is no requirement for Dubois's expectations to be based in an agreement for them to be reasonable. "As denoted by 'reasonable', the concept of reasonable expectations is objective and contextual": BCE at para. 62. Ultimately, "[t]he remedy is focused on concepts of fairness and equity rather than on legal right": BCE at para. 71.

[69] The reasonable expectations analysis proceeds "having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations": BCE at para. 62. The Shareholders' Agreement is one part, albeit a significant part, of this; it "may be viewed as" reflecting the parties' expectations: BCE at para. 79. However, in this case, the Shareholders' Agreement did not address Dubois's terms of employment; it was logical it had little influence on the judge's analysis.

[70] In this case, the entire context--what the judge referred to at para. 256 as "the nature of Lucid, the relationship between Milne and Dubois, and their roles in Lucid"--provided the basis for the judge's conclusion on the reasonableness of Dubois's employment expectation.

[71] The judge made specific findings to this effect. He found Dubois had participated in the management of the company from "at least 2000 onwards" (at para. 256), supporting an expectation that he would continue as an employee participating in management. Dubois testified that, prior to 1998, Milne made repeated offers to have Dubois come work at Lucid. He said Milne convinced him to do so, and continue working there, out of an understanding that they would be building a business together. As the judge found, Milne "wanted not only

Dubois' money in purchasing the shares in Lucid, but also his ability and skills" (at para. 271). The judge found that "Dubois' interests as an employee were closely intertwined with his interest as a shareholder" (at para. 272).

- [72] Dubois's evidence (accepted by the trial judge) was that the expectation he would work indefinitely at Lucid reflected "our understanding", and the judge expressly found that "[i]t is also clear that this was Milne's expectation, given his comments that he wanted someone with a vested interest in Lucid and given the reduced purchase price at which he sold the Class C shares to Dubois" (at para. 256).
- [73] This finding was based on the precise analysis of context described in BCE. The judge did not find the expectation of ongoing employment reasonable out of some misapprehension that such an expectation was promised by contract; instead, he looked at the relationship between the parties and concluded that, notwithstanding the absence of a contractual promise to guarantee the expectation, it was objectively reasonable.
- [74] The appellant Milne says that Dubois's employment expectation cannot have been reasonable because Dubois was only a 5% shareholder when he became employed at Lucid, around the time he said he expected to stay on as an employee. However, in finding Dubois's expectation of ongoing employment reasonable, the judge referred to Milne offering him the opportunity to purchase a 40% stake in the company because "he wanted someone with a vested interest in Lucid" (at para. 256), and the fact that Milne offered the shares at a lower price than they were sold to W. Son's. The judge places the genesis of Dubois's reasonable expectation around the time he became a 45% shareholder in the company.
- [75] The judge was asked to look at these actions and determine if this was the behaviour of an employee who happened to own shares, or someone whose concept of employment was inextricably bound up in their shareholding. The judge concluded it was the latter: Dubois "worked long hours and conducted himself as an owner would" (at para. 272). Milne undoubtedly benefited from Dubois's significant commitment to the business. In finding it reasonable for Dubois to expect he would not be unjustifiably removed from the company while continuing as a shareholder, the judge was concluding it was "just and equitable" in the circumstances (to quote BCE) to ensure Dubois was bought out of the company at a fair price.
- [76] The judge's conclusion--after hearing a variety of evidence with respect to Dubois and Milne's relationship--was that Dubois's employment expectation was bound up in his shareholder status, and that this was reasonable. As he stated, "Dubois considered himself on an equal footing to Milne and I infer, based on the evidence, that up until 2010, Milne shared the same view" (at para. 271).
- [77] The appellant makes the additional argument that his actions should have been protected by the business judgment rule. I will address the business judgment rule further in the next section, but suffice to say the judge's finding with respect to employment clearly rejects this possibility. The judge found that "there was no basis for Milne to terminate Dubois when he

did" (at para. 257). This leaves no room for the appellant's assertion that the unhealthy relationship between the two, and its impact on morale at the company, made Dubois's firing a justified business decision. Instead, the judge found the firing motivated by personal, not business, interests. As he put it, "Milne's relationship with Dubois is toxic" (at para. 279).

[78] I do note the error in the judge's statement that, in his opinion, "the wrongful dismissal of Dubois establishes a finding of oppression on its own" (at para. 273). I emphasize again that the oppression remedy is distinct from contractual remedies: just as oppression relief does not require the breach of a contractual right to be available, so does a breach of contract not mandate oppression. To reiterate Justice Newbury's statement from 1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd., 2016 BCCA 258 at para. 54, quoted above:

[W]here the complainant is able to show an entire course of oppressive conduct which includes another cause of action (in Naneff, wrongful dismissal), that cause may also be remedied under the oppression provision.

[Emphasis in original.]

[79] Or, as Justice Blair stated in the trial decision in Naneff v. Con-Crete Holdings Ltd., [1993] B.C.J. No. 1756 at para. 25 (Ont. Gen. Div.), var'd with respect to remedy [1994] O.J. No. 1811 (Ont. Div. Ct.), rev'd [1995] O.J. No. 1377 (Ont. C.A.):

[A] claim for wrongful dismissal is not, in itself, a proper claim to be asserted by way of oppression remedy. Where the dismissal is part of an overall pattern of oppression, and where the complainant's position of employment is closely connected with his or her rights as a shareholder, officer and director of the company, or companies, in question, the dismissal may properly be considered as part of that pattern of conduct . . .

[80] Oppressive conduct can encompass other legal wrongs, but cannot be contingent on a finding of a separate legal wrong: see also BCE at para. 71, making this point. To the extent it suggested otherwise, the judge's statement at para. 273 was incorrect. Yet given that the judge's finding of oppression did not indeed rest on wrongful dismissal alone, and was based on the existence of close connection between Dubois's employment and his rights as a shareholder, there is no error in the result stemming from this misstatement. I note further that there is no suggestion that the settlement Dubois entered into for his wrongful dismissal resolved any claims he might have as a shareholder, or that the remedy in this case duplicates a remedy for wrongful dismissal. The relief in this case was specific to his shares, and there is no argument he has been overcompensated for the harm suffered.

[81] The judge's conclusion that Dubois's employment expectations were reasonable in the circumstances betrays no error.

2. Dividend and Salary Expectations

- [82] The two remaining expectations the judge found reasonable were that Dubois would receive dividends in 2010 and 2011, and that Milne's salary would be restricted to \$60,000 a year. In my view, the judge's findings again demonstrate an appropriate contextual analysis on these points.
- [83] It is unquestioned that Milne, as the sole director of Lucid, had broad legal powers to make decisions on behalf of Lucid. The parties dispute the extent to which the Shareholders' Agreement imposed limits on these powers with respect to awarding salaries for new appointments to corporate positions, but it is unnecessary to decide the scope of these limits in the circumstances of this case. It is sufficient to say the judge's expectations analysis considered relevant factors, including Milne's motives, in finding Dubois's expectations reasonable, and does not reveal palpable and overriding error.
- [84] On the facts as the judge found them, Milne appointed himself to three new positions and tripled his salary "for the specific purpose of depriving Dubois of the dividends he was entitled to", and then consequently withheld dividends in fiscal years ending 30 June 2010 and 30 June 2011 "again for the purpose of forcing Dubois out of Lucid" (at paras. 274-75). The judge linked this action to the context of Milne's overall behaviour at the time:
- [248] Milne, based on all the evidence, clearly became very controlling after his hospitalization and began to micromanage Lucid. He made disparaging comments about Dubois after his hospitalization and avoided Dubois.
- [249] Milne, in my view, pushed Dubois out of Lucid in an effort to maintain control of that company. An example of Milne's need for control was his actions in influencing what some of the witnesses said when they made their affidavits.
- [85] It is not entirely clear from the evidence how Milne intended to force Dubois out by withholding dividends. Various theories were advanced at trial, including that Milne hoped Dubois would sell his shares to Milne at a low price, or that he simply wished to retaliate against Dubois for perceived wrongdoing in their friendship. However, the anticipated result is immaterial to the analysis of reasonable expectations. What is significant is that in the context of the relationship between the parties and the state of the business, Dubois's expectations that Milne would not suddenly fire Dubois, triple his own salary, and refuse to pay dividends were reasonable.
- [86] Further, as the judge stated at para. 265, the Shareholders' Agreement specifically addressed Milne's salary as Manager and set it at a maximum of \$60,000 per year. While Milne argues that the board's power in the Shareholders' Agreement had been used to alter the payment of management fees generally--and, specifically, to pay Dubois when he was hired by the company--the fact that past practice may have differed from the precise wording of the Agreement does not mean the judge erred in relying on this aspect of the Agreement to assess the parties' expectations with respect to salary. It was evidence of the relationship between the parties, and could be validly used to buttress a finding that Dubois reasonably expected Milne's salary not to change in a substantial way.

- [87] This analysis would have, of course, been different had the judge accepted Milne's argument that his decisions with respect to dividends and salary were simply strategic business decisions. But he did not.
- [88] The business judgment rule affords deference to the decisions of directors made in good faith (BCE at para. 99), and while a shareholder can reasonably expect to be treated fairly, fairness does not mean all decisions made by directors must serve the interests of shareholders. "[T]he question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen": BCE at para. 82.
- [89] In his reasons, the judge simply did not accept that Milne's decisions were made "in the best interests of the corporation" and treated Dubois fairly. In fact, he firmly rejected Milne's testimony wherever it was in conflict with Dubois's (at para. 250), including Milne's assertion that he had made his decisions in the company's best interests. Milne's testimony was found to be contradictory (at paras. 236 and 239). For example:
- [237] Milne testified that Dubois hired, trained and took care of all employee problems. Milne also testified that Dubois dealt with all of the purchasing of product for Lucid and that Lucid was a very successful company while Dubois was there. Yet, Milne took the position that Dubois did not understand how to run Lucid.
- [90] In explaining his "difficulties" with Milne's evidence, the judge noted that three of the former or current Lucid employees who testified--two of whom were witnesses for Dubois, and one for Milne--all stated Milne "either coerced, intimidated or influenced them when they were making their respective affidavits" (at para. 234).
- [91] It is not difficult to discern from the judge's credibility findings why he concluded that the firing, salary increases, and failure to pay dividends were motivated by Milne's feelings towards Dubois, and not business judgment.
- [92] Further, the judge clearly rejected Milne's argument that the salary increases were justified on the basis of his increased workload. As the judge stated, "Milne testified that he was performing the functions of three different positions. This is not how Lucid was operated in the past and it is inconceivable that Milne was actually performing the duties of three full-time positions" (at para. 242). Not convinced that Milne's increased salary reflected an increased workload, the judge was consequently not satisfied that rerouting dividends to pay this increased salary was a decision made in service of the corporation. Thus, Milne's decisions were not protected by the business judgment rule.

- [93] Milne simply has not demonstrated any palpable and overriding error in the judge's findings with respect to reasonable expectations. In asking this Court to find Dubois's expectations were unreasonable in context, or unreasonable because Milne's actions were protected by the business judgment rule, Milne effectively asks this Court to reweigh the evidence at trial on these points.
- [94] I would not give effect to this ground of appeal.

C. The Judge Did Not Err in His Choice of Remedy

- [95] This brings me to the error alleged in the exercise of the judge's discretion on remedy. As stated above, the judge's choice of remedy is entitled to significant deference and should not be disturbed absent an error in principle, failure to give weight to relevant considerations, or decision that results in an injustice: *Khela v. Phoenix Homes Limited*, 2015 BCCA 202 at para. 37.
- [96] Milne argues the judge failed to take into account the fact that dividends were eventually paid to Dubois following his firing. It is true that Dubois received dividends in respect of fiscal years 2011-14 (some \$163,485 in total). However, not only did the judge explicitly take note of this fact (at para. 282), but he acknowledged that Milne not only received dividends as a shareholder but also enjoyed very substantial salaries for his various positions in Lucid during the years after 2010 (at para. 285).
- [97] Given the salary increases were found to be deliberate conduct aimed at Dubois, in breach of his reasonable expectations as a shareholder, there was a clear logical link between the circumstances of the oppression and the judge's decision to order Milne, rather than Lucid, to purchase the shares. As one judge summarized in *Beck v. Dumais*, [2003] O.J. No. 1265 (Ont. S.C.J.), such an order is not unusual:
- [113] Courts will make oppression orders against directors personally in cases involving small, closely held companies, where the director whose conduct is under review was the sole controlling owner and directing mind of the company, and where the conduct in question has redounded directly to that person.
- [98] Milne was the controlling mind of this small, closely held company, and benefited from the oppressive conduct through substantial salary increases. Approaching the judge's exercise of discretion deferentially, I cannot say he erred in visiting the cost of repurchasing the shares on Milne, the exclusive author of the harm done to Dubois's expectations.
- [99] Finally, requiring Milne to purchase Dubois's shares is certainly contemplated as a remedy in s. 227(3)(h) of the BCA, which allows the court to make an order "directing a shareholder to purchase some or all of the shares of any other shareholder".

[100] Oppression is an equitable remedy; it seeks to enforce not just what is legal but what is fair (BCE at para. 58). In my view the judge struck a remedy that reflects rough fairness between the parties, and I see no error in principle in his reasoning. I would not disturb it.

VI. Conclusion

[101] I would dismiss the appeal.

"The Honourable Chief Justice Bauman"

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[102] I have had the opportunity to review, in draft, the reasons of the Chief Justice, and agree that the appeal should be dismissed. I also agree, for the most part, with his analysis. I do not, however, agree that the termination of Mr. Dubois's employment was a factor that gave rise to an oppression remedy, and am therefore providing separate reasons for judgment.

I. The Failure to Pay Dividends in a Timely Manner

[103] I agree that the trial judge made no error in finding that the company's failure to pay dividends to Mr. Dubois in a timely manner constituted oppressive conduct. The right to annual dividends was established in the company's articles, and Mr. Dubois had a reasonable expectation that they would be paid in a timely manner. They had apparently been paid on a quarterly basis prior to 2006. Between 2006 and 2010, there appears to have been a consensus among the shareholders that dividends should be temporarily suspended, in order to increase retained earnings. The minority shareholders, however, did not give up their right to dividends, and it was reasonable for them to expect payments to resume when they no longer agreed to the suspension.

[104] The judge found that the delay in paying dividends was not a matter of business judgment, but rather constituted oppressive conduct orchestrated by Mr. Milne for the purpose of putting pressure on Mr. Dubois. I agree with the Chief Justice that this finding by the trial judge does not exhibit any error.

II. The Increases to Mr. Milne's Salary

[105] I also agree that the judge made no error in characterizing Mr. Milne's conduct in substantially increasing his own salary as oppressive conduct. The judge was entitled to find that the increases in salary were designed to limit the amount of money available to pay dividends. The Shareholders' Agreement established expectations with respect to Mr. Milne's salary, and the thwarting of those expectations was a factor justifying the granting of an oppression remedy.

III. Was Mr. Dubois Required to Pursue a Derivative Action?

- [106] A shareholder may only bring an action for oppression where the shareholder has suffered particular prejudice or damage apart from the prejudice suffered by all shareholders. Where the shareholder's damage is the same as that suffered by all shareholders, the action must be brought on behalf of the company, as a derivative action.
- [107] I agree with the Chief Justice's conclusion that Mr. Dubois suffered particular prejudice, and is entitled to bring an oppression action. I recognize that in his analysis, the Chief Justice places some emphasis on the termination of Mr. Dubois's employment as constituting particular prejudice. As I read his reasons, though, he does not rely exclusively on that aspect of the case in reaching the conclusion that particular harm was suffered by Mr. Dubois.
- [108] In my view, the context of this case was such that Mr. Dubois was entitled to bring the action as an oppression action, notwithstanding that parts of his claim might, at least theoretically, have been pursued by way of a derivative action. This case has much in common with 1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd. in that respect. In that case, the majority shareholder had charged the company excessive management fees in order to appropriate its profits to himself. The result was that no money was available to pay dividends. The defendant argued that the excessive fees constituted harm to the company, not to the minority shareholder, and that it was remediable only by way of a derivative action. Justice Newbury, after considering *Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111 and *Rea v. Wildeboer*, 2015 ONCA 373 considered that the matter could be pursued by way of an oppression application, and did not need to be the subject of a derivative action:
- [78] At the end of the day, I remain bound by, and respectfully agree with, the principle that the claimant in an oppression action must show particular prejudice or damage beyond the diminution in value of his or her shares as a result of the allegedly oppressive conduct.
- [79] In the case at bar, [the minority shareholder] did not seek damages for any diminution in the value of its shares in [the corporation]. Rather it sought to have its shares purchased for a price calculated as if the fees had not been paid out .
- [80] In my view, [the minority shareholder] has shown particular prejudice or damage, personal to itself, and should not be required to sue derivatively. As seen earlier, the trial judge found that [the majority shareholder] treated [the corporation] "as if it was his alone" and without regard for the minority shareholder's position and that [he] had been motivated by the hope of buying [the minority shareholder] out of [the corporation] cheaply. Thus it may be said that [the majority shareholder's] appropriation of a large proportion of [the corporation's] earnings over several years without the payment of any dividend or other benefit to [the minority shareholder] formed part and parcel of the sustained and deliberate course of conduct that was unfairly prejudicial to [it]. The prejudice was suffered solely by the minority shareholder; obviously, no other shareholder suffered loss or prejudice. Indeed the fact all of this occurred against the background of a two-member corporation is a key

contextual factor: if [the minority shareholder] were required to bring a derivative action on behalf of [the corporation] against [the majority shareholder] to recover the "excessive" management fees, the court would likely order that they be repaid to [the corporation]. It of course is controlled by [the majority shareholder]; thus the remedy would be wholly counterproductive.

- [109] Similarly, in the case before us, the actions of Mr. Milne were systematically directed at preventing the minority shareholders from sharing in the company's profits. By substantially increasing his own salary, Mr. Milne diverted money to himself and reduced the amount that would otherwise be available to pay dividends. The failure of Mr. Milne, as director of the company, to declare dividends in a timely manner also substantially reduced the benefits flowing to the minority shareholders. Mr. Milne sought to make the position of the minority shareholders -- and particularly Mr. Dubois, who held a 45% interest in the company -- untenable.
- [110] Given the context of this case -- a closely held company in which Mr. Milne held 50% of the equity, and Mr. Dubois held 45%, it would not be productive to require Mr. Dubois to pursue a derivative action. In the circumstances of this case, an individual action based on oppression was available to Mr. Dubois.
- [111] As the Chief Justice has indicated, it is not essential to an oppression action that the plaintiff have uniquely suffered from the oppressive conduct. The fact that Ms. MacKay, who held 5% of the company's equity, also suffered from the conduct does not preclude Mr. Dubois from pursuing a remedy against Mr. Milne. The BCA specifically contemplates an application by a shareholder for an oppression remedy where some other shareholders also suffer the consequences of the allegedly oppressive conduct:

227(2) A shareholder may apply to the court for an order under this section on the ground

- (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant .

IV. The Termination of Mr. Dubois's Employment

- [112] I turn, then, to the question of whether the termination of Mr. Dubois's employment was properly a factor to be considered in determining whether Mr. Milne acted oppressively.
- [113] It is well-established that a plaintiff may pursue an action for oppression only in respect of wrongs suffered qua shareholder, and not for wrongs suffered in other capacities: see 1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd. at para. 54, and the cases cited therein. Normally, a person who is both an employee and a shareholder of a company cannot bring an oppression action in respect of claims that arise qua employee.

- [114] As Mr. Dubois points out, there are a small number of cases in which oppression actions have included claims arising out of the termination of employment. In particular, he cites *Kabutey v. New-Form Manufacturing Ltd.* (1999), 49 C.C.E.L. (2d) 252 (Ont. S.C.J.); *Naneff v. Con-Crete Holdings Ltd.* (1994), 19 O.R. (3d) 691 (C.A.); and *Elliott v. Opticom Technologies Inc.*, 2005 BCSC 529.
- [115] *Kabutey* did not concern the question of whether a wrongful dismissal could constitute oppression. Rather, the case involved a shareholders' agreement that provided that, on termination of employment, the company was required to repurchase the employee's shares. The question in the case was whether the majority shareholder had engaged in oppressive conduct with a view to diminishing the value of the shares on the repurchase. In my view, *Kabutey* is not of assistance in the current case.
- [116] In *Naneff* and *Elliott*, on the other hand, dismissal of a shareholder from a management position within the company was found to form part of the oppressive behaviour giving rise to a remedy under companies' legislation. In those cases, the courts found that the companies in question had been structured in such a manner as to closely tie employment to shareholdings, such that the right to be employed in a management position flowed from the status of being a shareholder. In *Elliott*, for example, the court found that the agreement that resulted in the issuance of the investors' shares included an implied term that the investors would be given continued employment with the company:
- [67] I am satisfied that Messrs. Elliott and Brink would never have made the investment to become shareholders unless they could become employees and be entitled to remain employees on this basis. In contrast to the situation in *Safarik* [*Safarik v. Ocean Fisheries Ltd.* (1995), 12 BCLR (3d) 342 (C.A.)], the shareholder interests and the employee interests of Messrs. Elliott and Brink were inextricably bound together. As a result, the impermissible termination of their employment was unfairly prejudicial to them as shareholders. They were unfairly deprived of the opportunity to nurture, preserve and profit from their investment as shareholders by way of their performance as employees
- [117] Where shares have been issued on the clear understanding that investors will, as a consequence of holding shares, be entitled to employment, termination of that employment can constitute oppressive conduct against those investors qua shareholders.
- [118] The mere fact that an employee is a shareholder does not mean that an oppression action will lie when the employee is wrongfully dismissed: *Mohan v. Philmar Lumber (Markham) Ltd.* (1991), 50 C.P.C. (2d) 164 (Ont. General Division). An action for oppression is concerned with the reasonable expectations of a shareholder qua shareholder. The onus was, therefore, on Mr. Dubois to show that he reasonably expected to continue to be employed by the company as a function of him being a shareholder.

- [119] The judge accepted Mr. Dubois's testimony, that he anticipated that he would continue to be employed by Lucid so long as he had shares in the company. He found that Mr. Dubois's expectations were reasonable, but does not appear to have considered whether the expectations were expectations qua shareholder, or merely expectations qua employee.
- [120] It is clear that the court must determine, in an oppression action, whether a shareholder's expectations qua shareholder, are objectively reasonable. In my view, the evidence in this case was not capable of sustaining such a finding.
- [121] First, it is noteworthy that, in contrast to the corporations in Naneff and Elliott, Lucid was not structured with any intention that minority shareholders would be employees or managers.
- [122] Mr. Dubois held class B and class C shares. His initial investment was in class B shares, which he acquired in 1997. At the time of acquisition, Mr. Dubois was not employed by Lucid, nor was there any discussion tying the investment to employment. Mr. Dubois testified that Mr. Milne had, at some point in 1997, tried to interest him in taking employment with Lucid. His evidence was vague as to whether these discussions occurred at the time when he was considering purchasing class B shares, or only after he had invested. In any event, he agreed that his initial investment was not linked to any offer of employment, nor did he commit to working for Lucid at the time.
- [123] The class C shares were created in late 1997, and were acquired, initially, by W. Son's. The Shareholders' Agreement was entered into when the class C shares were created, placing certain restrictions on the management of Lucid, and giving minority shareholders a right to be consulted on certain decisions. Neither W. Son's nor any of its directors, officers, or employees held positions as employees, directors, or officers with Lucid. The class C shares were simply an investment.
- [124] Under the terms of the Shareholders' Agreement, W. Son's was not entitled to transfer its shares for a period of three years. When it was able to do so, in late 2000, it sold them to Mr. Milne, who, in turn, sold them to Mr. Dubois.
- [125] At the time Mr. Dubois acquired these shares, he had been working for Lucid for just over two years. Mr. Milne expressed the view that he wanted Mr. Dubois to have a vested interest in the company. As I will discuss, that statement, when placed in context, could not reasonably support an understanding that the new investment was linked to permanent employment.
- [126] Mr. Dubois filed an affidavit setting out his expectation that he would be employed by the company as long as he held shares in it. He was referred to the affidavit in his examination in chief:

Q: Now, let's return to your affidavit. [A]t paragraph 14 you say:

It was always our understanding and my expectation that so long as I was a shareholder of the Company, I would have the right to be employed by the Company as well.

And I'll just pause there and ask you how did you come to have that understanding?

A Well, in the beginning the company was really not much and me putting the original money into it, me actually joining the company, I really kind of tied both together that if I was going to make -- I took a cut in salary to actually -- to begin with Lucid from my former job. And so I kind of put the two together, that I would have a job as long as I had shares in the company and I would have shares in the company as long as I had the job. It just kind of became one for me.

[127] There are serious difficulties with this explanation. The first problem is that Mr. Dubois refers to his expectation arising when he "put[] the original money into [the company]", but at the time of his initial \$5,000 investment, it is clear that no one linked it to employment with the company. He also talks about "taking a cut in salary to work for Lucid". His decision to take employment with Lucid, however, was unconnected with his acquisition of shares. He was a close friend of Mr. Milne, and filled in for him when he went on a business trip. He enjoyed the work, and on Mr. Milne's return, was invited to stay with the company. At that time, he had been a class B shareholder for some time, and it would be a considerable length of time before he purchased class C shares.

[128] It is true that Mr. Dubois took a cut in pay to join Lucid. No doubt, as an employee, this would be a factor in determining his rights in a wrongful dismissal action. There is no indication, however, that there was any discussion, when Mr. Dubois originally joined Lucid, of the security of his tenure, nor was his employment, either explicitly or implicitly, tied to his shareholding.

[129] The judge does not appear to accept Mr. Dubois's contention that his expectations of permanent employment arose at the time of his original investment. Indeed, he ignored Mr. Dubois's explanation of the genesis of his expectations, instead focussing on Mr. Dubois acquisition of the Class C shares in 2000:

[256] Considering the nature of Lucid, the relationship between Milne and Dubois, and their roles in Lucid, it is objectively reasonable for Dubois to expect that, so long as he was a shareholder of Lucid, he would have a right to be employed by that company and to participate in the management of Lucid. That is what occurred from at least 2000 onwards. It is also clear that this was Milne's expectation, given his comments that he wanted someone with a vested interest in Lucid and given the reduced purchase price at which he sold the Class C shares to Dubois.

[130] The judge's suggestion of a "reduced purchase price" for the class C shares is problematic. It is true that W. Son's had paid \$40,000 for the shares when it initially acquired them in 1997, and that Mr. Dubois paid only \$17,500 for them in 2000. On the other hand, W. Son's sold the shares to Mr. Milne for \$10,000 shortly before he resold them to Mr. Dubois, so Mr. Milne, far from discounting the price, actually made a profit on the resale.

[131] In terms of contemporaneous expectations of long-term employment, Mr. Milne had, apparently, told Mr. Dubois that the long-term goal was to hire others to run the company. Mr. Dubois testified as to that understanding in his examination in chief:

[I]t was [Mr. Milne's] philosophy. It was pitched to me right from the beginning, even when I bought the shares - is come on, let's get in here; let's build this thing up, and then we're going to hire some good people to run it, and we can sit back and reap the rewards. And I'd say, that's a really good idea; let's do that. And it was something that Carey really wanted to follow through on. And I remember having conversations with him in 2004, 2005, 2006 that, we're getting there; we're getting there. And I would say probably by 2006 he actually started, you know, I'm not coming in today; I can do this from home, blah, blah, blah. And he encouraged me to do the same. The problem was I was having too much fun, and I felt that I needed to be there more to do that. But I said, hang on; we're almost there; again, good idea but let's play it forward a little bit more.

[132] In short, the idea that employment would go hand-in-hand with shareholding does not appear to have been the expectation at the time Mr. Dubois made his initial investment, nor was such an understanding an element of his subsequent, larger investment.

[133] In these circumstances, there was, simply put, no evidence from which the judge could conclude that as a shareholder Mr. Dubois had an expectation of continued employment. While he may well have had certain expectations as an employee, those were matters to be considered in a wrongful dismissal action, and not in a claim for an oppression remedy.

[134] Mr. Dubois brought an action for wrongful dismissal against Lucid, and the action was settled. The terms of settlement were not put before the trial judge. That action was the proper forum for dealing with the reasonable expectations of Mr. Dubois qua employee.

[135] Before leaving the wrongful dismissal issue, I would add two comments. First, in concluding that the wrongful dismissal did not provide a foundation for an oppression remedy, I do not suggest that the judge was not entitled to consider Mr. Dubois's termination as part of the background in this case. Mr. Dubois's wrongful dismissal underlines the personal animosity exhibited by Mr. Milne toward him, and could have assisted the judge in finding that Mr. Milne's other actions -- particularly the withholding of dividends and the increases in his own salary -- were not legitimate business decisions, but rather decisions targeting Mr. Dubois.

[136] I also note that the judge found that Mr. Dubois had four separate reasonable expectations that were engaged in the oppression analysis:

[267] Based on a review of the evidence I make the following findings with regard to Dubois' reasonable expectations:

- a) Dubois had a reasonable expectation that he would receive 45% of the net income after taxes from Lucid including for fiscal years ending June 30, 2010 and June 30, 2011.

- b) Dubois had a reasonable expectation that not only was he a 45% owner of Lucid, but that he would have a role in Lucid's management.
- c) Dubois had a reasonable expectation that he would have employment with Lucid for as long as he had shares in Lucid.
- d) Dubois had a reasonable expectation that Milne's salary would be restricted to \$60,000 per year based on the Agreement.

[137] The judge concluded, at para. 276 of his judgment, that Mr. Milne's actions in increasing his own remuneration and in withholding dividends were sufficient to constitute oppression, even without the wrongful dismissal allegation. In my view, that conclusion was open to the judge.

[138] It is not at all clear what part the "role in management" expectation played in the judge's reasoning. It was not a focused aspect of his decision, nor has it been explicitly dealt with on this appeal. It is possible, that, quite apart from continued employment, Mr. Dubois had some expectation that he would be involved in the management of Lucid. Although there is no suggestion that he was entitled to be a director of the company, the Shareholders' Agreement and past practices could provide a foundation for an entitlement to be consulted on at least some types of decisions. Given the absence of directed submissions on this issue, and given that it cannot affect the result of this appeal, however, I will say no more about it.

V. Remedy

[139] Finally, I agree with the analysis of the Chief Justice on the issue of remedy. It might well have been desirable for the parties to adduce more evidence at trial to quantify the actual damage incurred by the plaintiff, and to make more detailed submissions on the appropriate remedy. A judge who concludes that a party has suffered damage, however, must do the best they can to fashion a remedy, even if the evidence and submissions do not allow for an elaborate assessment of the damages.

[140] It is not possible to say that the remedy granted by the trial judge was outside the range of reasonable outcomes, or that he acted beyond his discretion in making the order that he did.

[141] Like the Chief Justice, I, too, would dismiss the appeal.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Fisher"

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