
CANADA / JUDGMENT

Popat v. MacLennan

2014 BCSC 2363

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Supreme Court of British Columbia

DECIDED

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2014 BCSC 2363 Popat v. MacLennan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Popat v. MacLennan,

2014 BCSC 2363

Date: 20141117

Docket: S143832

Registry: Vancouver

Between:

Zahir Popat and LaRoche Capital Group Inc.

Petitioners

And

Alistair MacLennan, Jasbinder Sanghera, Roger Kuypers and

SignalChem Lifesciences Corporation

Respondents

Corrected Judgment: The text of the judgment was corrected on the front page
on March 11, 2015

Before: The Honourable Mr. Justice Affleck

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:

T. Goepel

Counsel for the Respondents Alistair MacLennan, Jasbinder Sanghera and Roger Kuypers:

R.W. Cooper

S. Foweraker

Counsel for the Respondent SignalChem Lifesciences Corporation:

D. Wotherspoon

G. R. Cameron

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 10, 2014

Place and Date of Judgment:

Vancouver, B.C.

November 17, 2014

- [1] THE COURT: The petition before me seeks a variety of relief which in essence is for what is known as an oppression remedy or remedies, the basis for which is found in s. 227 of the Business Corporations Act, S.B.C. 2002 c. 57. The petition was filed on May 10, 2014, by different counsel from the counsel who represented the petitioners on this hearing. A response to the petition was filed on September 11, 2014. I am informed that Mr. Goepel was retained on November 5, 2014, and immediately requested the respondents to agree to adjourn the hearing of the petition to the trial list. They declined and on November 6, 2014, the petitioners filed a notice of application seeking an adjournment and a reference to the trial list.
- [2] The petitioners' primary position before me is that the issues raised by the petition cannot be fairly decided on affidavits alone, whose deponents do not always agree on the facts.
- [3] The petitioners seek an order that the rules of practice which apply to a civil trial will apply to the proceeding, including oral and documentation discovery. The notice of application of November 6 also seeks consolidation of the hearing of the petition with four actions before this court, which the petitioners obviously assert have elements in common with elements of the petition proceeding. On the hearing before me of the petition on November 10, 2014, I was not asked to decide the consolidation application.

- [4] The respondents submit the questions put in issue by the petition are capable of summary determination. They urge upon me that delay in deciding the issues raised by the petition is damaging to the interests of the respondent corporation, which I will refer to as SLC. I accept that the issues raised by the petition ought to be decided as soon as reasonably possible, as should the question of whether there ought to be a trial. Hence I advised the parties on November 10 that I would deliver oral reasons today. These are those reasons. I reserve the right to edit them.
- [5] The petitioners are shareholders in SLC. The corporate petitioner is controlled by the petitioner Mr. Popat. When shares were initially allocated to the petitioners, their interest in SLC was approximately 24% of the issued and outstanding shares. Subsequently further shares were allotted, some of which went to Mr. Popat, but further shares were allotted to other shareholders, which had the effect of greatly diluting the interest of the petitioners in SLC in relation to the interests of other shareholders who had received additional shares. The petitioners' interest went from about 24% to about 4%.
- [6] It is that dilution which the petitions seek to have rectified in some manner by invoking the jurisdiction of this Court found in s. 227 of the Business Corporations Act. The petitioners seek to have a trial at which declarations will be sought that the issuance of additional shares and their allocation in a manner which diluted the petitioners' interest in SLC was an exercise of the directors' powers which was oppressive of the petitioners and unfairly prejudicial within the meaning of the Business Corporations Act.
- [7] If declarations are made, the petitioners will seek appropriate remedies. On the other hand, if the decision of this Court is to hear and decide the petition without a trial and if the court determines the issuance and allocation of shares in a manner which diluted the petitioners' interest in SLC was unlawful, the petitioners say the question of remedy should be adjourned. If the court determines the issuance and allocation of shares was unlawful, and a remedy ought to be imposed without the need for an adjournment to consider the issue of the remedy, the petitioners submit the court ought to order that the petitioners will be allotted a further 3,131,936 shares, which would restore their relative position within SLC and that the court would order those shares be purchased by the respondents at a value to be determined, or the court could assess that value by reference to an e-mail of October 21, 2013, from the respondent Mr. Sanghera. That value is \$152,000,000.
- [8] The burden of establishing oppressive or unfairly prejudicial conduct by the respondents rest on the petitioners. In *Callahan v. Callahan*, 2011 BCSC 40, Madam Justice Gerow addressed the legal principles which guide a court in applying the provisions of s. 227(2) of the Business Corporations Act, which subsection reads as follows:

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, 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.

[9] At paragraphs 17 through 22 of Callahan, the following is found:

[17] The parties do not disagree about the case law; rather, they disagree about the application of the case law to the facts. It is clear from the cases that the onus is on the petitioner to establish that the affairs of Hywood are being conducted in a manner that is oppressive to him, or there have been acts of Hywood which are unfairly prejudicial to him. The complaint must consist of more than unhappiness regarding decisions by the management of Hywood or the majority of its shareholders.

[18] In *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, the Supreme Court of Canada discussed the oppression remedy in the context of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, which contains a similar provision to s. 227 of the Business Corporations Act. After discussing two approaches to the interpretation of oppression provisions taken in the case law, the Court concluded at para. 56:

In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the CBCA.

[19] The Court went on to note at paras. 58 and 59 that the oppression remedy is an equitable remedy which seeks to ensure fairness and is fact specific. The reasonable expectations of the parties are to be considered contextually. One must consider the circumstances, keeping in mind that what may be oppressive in one situation may not be in another.

[20] The reasonable expectations of all of the affected shareholders must be considered. At para. 62, the Court discussed what must be considered in determining whether an expectation is reasonable:

As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable 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.

[21] The Court at para. 68 stated:

In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[22] In BCE at para. 72, the Court identified several factors that may assist in an analysis of whether a reasonable expectation exists, including commercial practice; the nature of the company; the relationships between the applicant and the other corporate actors; past practice, whether the applicant could have taken steps to protect itself against the prejudice he claims to have suffered, any agreements and representations, and the fair resolution of conflicting interests between corporate stakeholders.

[10] The answer to the question of what are the reasonable expectations of the shareholders is to be determined objectively depending on the facts of the particular case. In Boffo Family Holdings Ltd. v. Garden Construction Ltd., 2011 BCSC 1246, this Court at paragraphs 109 and 110 observed:

What is just and equitable must be judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct which might be considered oppressive in one situation may not be in another: BCE at 59.

The reasonable expectation of stakeholders is the cornerstone of the oppression remedy. The concept of reasonable expectation is objective and contextual. Because of its fact-specific nature, it is impossible to catalogue all situations where a reasonable expectation may arise. Considerations that may be useful in determining whether a reasonable expectation exists include: general commercial practice, the nature of the corporation, the relationship between the parties, and past practice: BCE at paras. 61, 62, 71 and 72.

[11] One indication of oppressive or unfairly prejudicial conduct in the management of the affairs of a company may be that the directors have used their powers to issue further shares in a manner which allows them to maintain control of the company. The petitioners do not take that position, nor do they say that they were entitled to participate equally in the issuance and allotment of additional shares, nor that the shares were issued and allotted for less than their appropriate value at the time of allocation. They complain that no consideration at all was given for the new shares and that a reason given by the respondents for the issuance and allotment of additional shares, namely that the original allocation was later seen by the directors to have been incorrect and unfair, cannot be supported because it does not meet the reasonable expectations of the shareholders who are entitled to rely on the original allotment. Mr. Goepel submits, "a deal is a deal".

- [12] A further reason given by the respondents for the issuance and allotment of additional shares was that, if that was not done, certain key employees intended to resign to the detriment of SLC. The petitioners say this is an ex post facto justification concocted by the respondents to justify their unlawful conduct of the affairs of SLC. As I understand their position, the petitioners submit the real reason for the issuance and allotment of additional shares in the manner it was done was to enrich the personal defendants, who the petitioners submit received at least some of their new shares at a tiny fraction of their then value. Evidence of the concern about the potential resignation of key employees is found in a letter described as the "unfair share allocation letter" of June 12, 2013, signed by four employees of SLC who were its directors of research and development, finance, corporate development and operations. They were also shareholders of SLC.
- [13] The unfair share allocation letter was addressed to the board of directors of SLC and is headed "Unfair Share Allocation to the Bio Reagent Business by SLC." In addition to that letter I also have the affidavit of Mr. Jun Yan, who was one of the signatories to the letter. I will return to the letter and to Mr. Yan's evidence later in these reasons. Before doing so, I will provide some background to the formation of SLC and the decision to issue and allocate additional shares, thereby diluting Mr. Popat's interest.
- [14] SLC was incorporated in April 2012. Its business is to engage in the development and production of certain proteins and enzymes. It describes itself as a life sciences company. SLC was incorporated to facilitate the joint operations of two companies known as SignalChem Pharmaceuticals Inc., which I will refer to as SCP, which was incorporated in 2004, and MetaSignal Therapeutics Inc., which I will refer to as MST, which was incorporated in 2010.
- [15] The respondent Jasbinder Sanghera at material times was president of both SCP and MST. SCP also engaged in the field of life science and was a profitable closely held company before the incorporation of SLC. SCP was prominently involved in what Mr. Sanghera describes as a bioreagent business distributing products worldwide. SCP developed what is known as a kinase inhibitor platform, which assists in the discovery of drugs to treat various medical conditions.
- [16] In April 2012 when SLC was incorporated, Mr. Sanghera and Mr. Yan, the latter of whom became the director of research and development of SLC and a signatory to the unfair share allocation letter, together owned the majority of the shares of SCP. The petitioners were not shareholders in SCP.
- [17] MST was incorporated in February 2010 to engage in the development and commercialization of therapies for the treatment of cancer through what was known as the CAIX program. Mr. Sanghera and Mr. Yan, along with two individuals who are not parties to this proceeding, owned the majority of the shares in MST. The petitioners were not shareholders in MST.

- [18] Mr. Sanghera and Mr. Popat met at an investors' forum in late 2011. Mr. Popat advised Mr. Sanghera that he had many years of experience in the pharmaceuticals industry and had been successful in raising substantial sums of money for investment in that industry and could do the same for MST, which was undercapitalized.
- [19] Mr. Sanghera and Mr. Popat continued to meet, and Mr. Sanghera became convinced by what Mr. Popat told him that Mr. Popat was himself a man of some wealth who knew of wealthy investors who Mr. Popat would attract to make investments in MST to allow it to pursue its work on the CAIX program. Mr. Sanghera's evidence is that a variety of approaches to a means to compensate Mr. Popat in return for his work in attracting investment money were considered, and it was eventually agreed SLC would be incorporated to effect a reorganization of the work of MST and SCP. Mr. Popat would be a shareholder of SLC. At that time it was part of the initial agreement reached that the bioreagent business of SCP would not be included in the reorganization but would remain a separate entity. As part of this agreement Mr. Sanghera deposes that Mr. Popat was himself to invest \$500,000 in SLC by the end of February 2012 and undertook to raise \$5,000,000 from other investors by the end of 2012. Once Mr. Popat's part of the agreement was fulfilled, he would become a major shareholder in SLC with a similar position to that of Mr. Sanghera and Mr. Yan.
- [20] Early in 2012 Mr. Popat requested changes to the corporate reorganization of SCP and MST which would be effected through SLC. In particular Mr. Popat wanted the bioreagent business to become part of SLC. Mr. Sanghera's evidence is that Mr. Popat threatened to terminate the agreement for his involvement in SLC if his conditions were not met and threatened legal action. Mr. Yan supports Mr. Sanghera's evidence in this regard.
- [21] Mr. Popat denies he agreed personally to invest \$500,000 in SLC and denies he agreed that his role was to raise \$5,000,000 from other investors. I have difficulty accepting this denial while at the same time accepting Mr. Popat was, without those contributions to the success of SLC, to become chairman of the board of SLC and its chief executive officer, as well as a major shareholder of SLC. Mr. Sanghera explained Mr. Popat was to be the chairman to enhance his role and thereby place him in a better position to attract investors. In any event, Mr. Popat did not invest \$500,000 in SLC and raised less than \$1 million from other investors. Mr. Sanghera's evidence is that Mr. Popat insisted Mr. Sanghera and Mr. Yan each invest \$50,000 in SLC despite their existing major shareholdings in SCP, which was by far the financially stronger company.
- [22] Mr. Sanghera deposes that the shareholders of SCP and MST, including himself, agreed with some reluctance to Mr. Popat's conditions. Mr. Yan's evidence is the same. One condition was the incorporation of the bioreagent business into SLC, and this concession was made because of the pressing need for MST to fund its CAIX program, which Mr. Popat's activities as a fundraiser were to facilitate.

- [23] Mr. Sanghera continued to believe that when Mr. Popat proposed his conditions, he personally intended to invest \$500,000 in SLC and had the necessary investor contacts to attract a further \$5,000,000 by the end of 2012.
- [24] Based on the new agreement that met Mr. Popat's conditions, Mr. Sanghera deposes Mr. Popat, as chairman and chief executive officer of SLC, assumed responsibility for determining the allocation of shares of SLC to the existing SCP and MST shareholders as well as the founding shareholders at SLC, including himself, Mr. Sanghera, Mr. Yan and several other individuals not parties to these proceedings.
- [25] Mr. Popat does not accept he was solely responsible for the share allocation, which he says was done by agreement. I accept that evidence but little turns on the conflict between Mr. Sanghera and Mr. Popat's evidence on this point. Mr. Popat deposes that he heard no criticism of the allocations until he saw the unfair share allocation letter in June 2013.
- [26] Mr. Popat takes the position that the respondents' concerns about the risk of losing the services of key employees who signed the unfair share allocation letter had no substance in reality. He deposes that only Mr. Yan could reasonably be described as a key employee and that all the others could be readily replaced if they resigned.
- [27] Following the reorganization of SCP and MST with the incorporation of SLC Mr. Sanghera became president of SLC and, as mentioned, Mr. Popat became chairman and chief executive officer. Mr. Popat then sought out investors but was able to attract only about \$925,000 from subscribers for shares over the next year.
- [28] On June 3, 2013, a meeting of SLC shareholders was held. One topic for consideration was the appointment of independent directors. As a result the respondents Alistair MacLennan and Roger Kuypers were appointed to the board. On June 5, 2013, Mr. Popat resigned as chief executive officer of SLC but remained a director.
- [29] Shortly thereafter Mr. Sanghera was approached by the signatories to the unfair share allocation letter, each of whom had been a shareholder in SCP, and each who was dissatisfied by the allocation of shares in SLC. Mr. Sanghera suggested they write to the board of SLC expressing their concerns. The unfair share allocation letter was the result. The petitioner submits it is doubtful the discontent originated with the authors of the letter and asserts this is a matter for trial.
- [30] The unfair share allocation letter begins with an expression of concern about the valuation given to the reagent business of SCP, which was folded into SLC. The letter complains that in the SLC share allocation the reagent business was recognized by a relatively small number of shares, notwithstanding it had been a self-sufficient, profitable and expanding business. The letter suggests SCP's substantial role in the overall prospects for success of SLC ought to have persuaded the board of SLC, as the signatories to the letter expressed it, to re-examine the share allocation to the bioreagent business with a view to correcting this "inequity".

- [31] Mr. Sanghera deposes he is concerned the signatories to the letter were questioning their future with the company, which he believed created a material risk they would resign, causing considerable damage to SLC. The unfair share allocation letter speaks of the "significant proprietary know how that has been developed over the years" by the signatories to the letter, which know how Mr. Sanghera feared would be a loss to SLC if they resigned. It is pointed out that SCP had purchased key man insurance on Mr. Yan and that Mr. Marotta, who signed the letter as director of sales and marketing for SLC, had scientific training and unique skills enabling him to explain the kinase inhibitor platform to potential customers. Mr. Yan's evidence is that he discussed his concerns with Mr. Popat but received a response which led him to consider resigning.
- [32] Mr. Sanghera's evidence is that he concluded the concerns expressed in the letter ought to be investigated. All members of the board agreed, including Mr. Popat. The board of SLC decided to seek advice from a person knowledgeable in the management of life sciences companies and their financing, in regard to the share allocations to members of SLC. Dr. Franck Brinkhaus, who had previously assisted SLC with fund raising and who has experience of life sciences companies and as well understood the kinase platform, was chosen to give the advice. Dr. Brinkhaus was given access to SCP, MST and SLC personnel and records to make his inquiries.
- [33] On October 7, 2013, Dr. Brinkhaus wrote to the personal respondents, who were by then the directors of SLC, to provide his views on the fairness of the original share allocation. In his report he describes the history of SCP and its profitability and concludes, to use his words, that SCP was the "backbone and foundation" of SLC without which SLC would not exist. Dr. Brinkhaus refers to SLC at its inception as no more than a shell company which had acquired assets by the transfer into the MST CAIX program and the kinase platform of SCP.
- [34] Dr. Brinkhaus advised the board of SLC that the share allocations had been "grossly incorrect" and unfair to the shareholders of SCP and made recommendations to the board for the reallocation of shares to rectify that unfairness, the effect of which recommendations would greatly enhance the shares available for allocation amongst shareholders of SLC who had been shareholders of SCP, but which would diminish the relative position of shareholders of SLC who had not been shareholders of SCP, such as the petitioners.
- [35] By the time of the receipt of Dr. Brinkhaus' recommendations, Mr. Popat had resigned from the board of SLC. This followed information given to the board on August 9, 2013, that the respondent, Mr. MacLennan, had met with Mr. Popat on that day to discuss the unfair share allocation letter, during which discussion Mr. Popat threatened to break Mr. MacLennan's legs. On August 19, 2013, Mr. Popat was requested in writing to resign from the board of SLC and did so. He sued for defamation, but his action was dismissed by Mr. Justice Melnick in reasons indexed at 2014 BCSC 1601.

- [36] In October 2013, the board of SLC met to consider the Brinkhaus recommendations. The concern about the possible resignation of key employees was raised. That factor and the advice of Dr. Brinkhaus persuaded the board a change in share allocations was necessary. The board discussed the effect of such a change on shareholders of SLC. The board decided to reallocate the shares, which included issuance of additional shares in SLC and their allocation to former SCP and MST shareholders among whom Mr. Popat was not numbered.
- [37] Cash subscribers for shares in SLC were to be allotted adjustment shares. The founders of SLC, such as Mr. Popat, were not given adjustment shares. Once those steps were taken, SLC had about 107,000,000 common shares issued and outstanding. Mr. Popat now held less than 5 percent of the outstanding shares.
- [38] In my view the decision of SLC's board to reallocate the shares was influenced in part by disillusionment with Mr. Popat's conduct of his role in the management of the company. I do not doubt the board reasonably expected Mr. Popat would himself make a substantial investment in the company and would be able to attract further millions of dollars. That expectation was to be disappointed. Further, Mr. Popat became a difficult colleague. His insistence on a revision to the initial agreement so that reagent business came to SLC instead of remaining in SCP and a threat of legal action, coupled with the physical threat to Mr. MacLennan, which led to Mr. Popat's resignation from the board, must have given rise to a concern that his pre-reallocation shareholdings in SLC gave Mr. Popat a level of influence in the company with which the other directors were uncomfortable.
- [39] Once the reallocation had happened concerns arose among the directors that, with such a large number of shares outstanding in a small company, the opportunity to conduct an initial public offering might be compromised. The board decided to recommend consolidation of its issued and outstanding shares on a 5.5 to 1 basis. On October 28, 2013, at a meeting of shareholders where 103,482,690 shares of the 107,274,465 issued and outstanding shares were represented, somewhat less than 75% were voted in favour of the consolidation.
- [40] The petitioners ask me to reject Dr. Brinkhaus' report on the basis it is simply attached as an exhibit to an affidavit and therefore cannot itself be evidence that the original share allocation was unfair. I agree, but it is evidence of what members of the board of SLC considered when exercising their fiduciary duty to the company and as such is relevant to the decision I am to make.
- [41] The respondents rely on the opinions of Richard Crosson, a chartered accountant and chartered business evaluator. In an affidavit filed in this proceeding Mr. Crosson asks "whether the value of the SLC shares received by the SCP / MST shareholders in the Merger was equal to or greater than the value, combined, of the SCP and MST shares exchanged" and Mr. Crosson concluded:

As the value of the SLC shares received by the SCP / MST shareholders in the Merger was significantly less than the value of SCP and MST shares given in exchange, based on the relative share value measure the Merger was not fair to the SCP / MST shareholders from a financial point of view.

[42] Secondly, Mr. Crosson considered "whether there were other financial advantages to the SCP / MST shareholders associated with the Merger that would cause the transaction to be fair even though it was unfair based on relative share value" and concluded that there were no other financial advantages that created fairness and therefore:

The Merger that occurred as part of the Corporate Reorganization whereby SLC acquired the shares of MST and SCP in exchange for 6,000,000 SLC shares was not fair to the SCP / MST shareholders (viewed collectively) from a financial point of view.

[43] There is no opinion before me challenging those of Mr. Crosson. However, the petitioners submitted the opinions are advanced in hindsight and are inadmissible. The petitioners refer to *Amos Investments Ltd. v. Minou Enterprises Ltd.*, 2008 BCSC 332, where this Court was critical of hindsight evidence as to value in an oppression action. In that case Mr. Justice Curtis referred to the reasons of McEachern C.J.S.C., as he then was, in *Cyprus Anvil Mining Corporation v. Dickson*, (1982), 40 B.C.L.R. 180 (S.C.), where the value of the shares of dissenting shareholders was in issue. Chief Justice McEachern observed that "a difficult question often arises in these cases about the admissibility and usefulness of subsequently obtained information" he held that the so called hindsight rule does not apply to valuation reports prepared after a valuation date except to the extent they rely wholly or partly on subsequently obtained information.

[44] My reading of Mr. Crosson's opinions does not persuade me he relied on subsequently obtained information. On the contrary, as I read his opinion, his conclusions are based on information available at the time of the original share allocation.

[45] The petitioners' central complaint, as I understand it, is that an agreement was made at the time of the original share allocation and a party to an agreement is not entitled to say after the fact, when the agreement is no longer attractive to that party, that it is entitled unilaterally to change it. The petitioners speak of the adverse effects such a proposition, if accepted, would have on the rule of law, the enforceability of contracts and more broadly the economic health of the country. I do not see the conduct of the respondents in such apocalyptic terms. In my view the directors of SLC were faced with making a decision about the original share allocation, that they were obliged to consider with care, keeping in mind their fiduciary duties to SLC. They had reason to believe some particularly important employees, whose loss to the company could be damaging to its viability, were considering leaving if the share allocation was not changed. If the share allocation was to be changed in a manner which diluted the petitioners' relative shareholdings, the question becomes whether the petitioner had a reasonable expectation that there could be no re-allocation if it had a significant dilutive effect.

- [46] The petitioners had no contractual right to insist their relative interest in SLC could not be diluted, and I am aware of no statutory prohibition on a reallocation which dilutes the interests of some shareholders. The petitioners submit the Business Corporations Act obliges the respondents to seek this Court's permission to alter the allocation of shares in the circumstances of the matter at bar. I know of no provision to that effect.
- [47] As referred to earlier in these reasons, the Supreme Court of Canada in the BCE case has held that the first principle to consider when an application is made relying on the oppression remedy is whether the reasonable expectations of the shareholders have been met. In my view the petitioners cannot demonstrate that a reasonable expectation that their shareholdings would remain undiluted no matter the exigencies SLC faced.
- [48] The decision by the directors to recommend a reallocation of shares was not taken lightly. There was a basis to respect the complaint of the employees who signed the unfair allocation letter, and on taking advice from a professional man with much experience in these matters the directors accepted that advice and acted on it. Moreover, the share consolidation is not open to criticism. All shareholders were treated equally. The consolidation decision was made for a valid reason, namely to have sufficient outstanding shares so that potential investors could purchase them.
- [49] Directors owe fiduciary duties to the company to exercise care, diligence and skill when making decisions about the management of the company and its affairs. The duty is to act in the best interests of the company. The discharge of that duty depends on the facts of any given situation. As Madam Justice Wedge said in *Casey v. CopperLeaf Technologies Inc.*, 2010 BCSC 417:
- [20] there are no absolute rules. Directors may find themselves in a situation where it is impossible to satisfy all stakeholders
- [21] Thus, everything depends on the particular facts and circumstances faced by the directors and whether, having regard to those circumstances, they exercised business judgment in a responsible way.
- [22] In other words, if context is not everything in oppression claims, it is almost everything.
- [50] In *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 at paragraph 67, the Court said the following:

Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

- [51] The petitioners submit the respondents' decision to reallocate shares and thereby dilute their interest was actuated by an improper motive, namely a desire to enrich themselves. In *Tech Corporation Ltd. v. Miller*, [1972] B.C.J. No. 566 (S.C.), although not an oppression case, at paragraphs 102 and 103, Mr. Justice Berger wrote:
- [102] How can the court go about determining whether the directors have abused their powers in a given case? How are the courts to know, in an appropriate case, that the directors were genuinely concerned about the company and not merely pursuing their own self-fish interests? Well a similar task has been attempted in cases of conspiracy to injure. There the question is whether the primary object of those alleged to have acted in combination is to promote their own interests or to damage the interests of others: *Crofter Hand Woven Harris Tweed v. Veitch*, [1942] A.C. 435.
- [103] I think the courts should apply the general rule in this way: The directors must act in good faith. Then there must be reasonable grounds for their belief. If they say that they believe that there will be substantial damage to the company's interests, then there must be reasonable grounds for that belief. If there are not, that will justify a finding that the directors were actuated by an improper purpose.
- [52] In my opinion the directors acted, as they did in somewhat difficult circumstances, to preserve SLC from the risk of serious damage to its interests. It is not for this Court to second guess management decisions of that type unless it is clear they are unreasonable; not in the best interests of the company and, in the context of an oppression proceeding, unfairly prejudicial to the petitioners. The petitioners have not satisfied me on any of those matters.
- [53] I will make a further brief comment. The petitioners submit, as I understand their position, that shares issued to Mr. Sanghera and Mr. Yan, as a result of the decision to reallocate, are not supported by consideration and ought to be cancelled. I do not accept this argument has merit. Section 64(3) of the Business Corporations Act provides that a share is fully paid by the payment of money or property or past services. Those who received additional shares in the reallocation, including Mr. Sanghera, Mr. Yan and Mr. Popat himself, had provided past services to SLC.
- [54] I conclude that this matter need not go forward to the trial list. The petition is dismissed with costs.

"Affleck J."

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