

CANADA / JUDGMENT

Sonic Holdings Ltd. v. Savage

2021 BCCA 441

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 441 Sonic Holdings Ltd. v. Savage

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Sonic Holdings Ltd. v. Savage,

2021 BCCA 441

Date: 20211123

Docket: CA46483

Between:

Sonic Holdings Ltd.

Appellant

(Plaintiff)

And

Thomas Charles Savage

Respondent

(Defendant)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

October 1, 2019 (Roussy v. Savage, 2019 BCSC 1669, New Westminster Docket 175379).

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E.J.S. Aitken

Place and Date of Hearing:

Vancouver, British Columbia

April 13, 2021

Place and Date of Judgment:

Vancouver, British Columbia

November 23, 2021

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Fitch

Summary:

The appellant appeals the dismissal of its claim against the respondent for breach of fiduciary duties owed as an officer and director of Sonic Drill Systems Inc. ("SDSI"), a closely held corporation that he managed and operated for two equal shareholders. The main allegation concerned a series of transactions referred to as "filler jobs" that SDSI entered into with TCS Industries Ltd. ("TCS"), a company owned by the respondent. The appellant alleged that the respondent failed to maintain proper oversight and adequate financial records of SDSI and that TCS was not invoiced fully for those transactions. The appellant sought disgorgement of profits in excess of \$3,000,000 alleged to have been received by TCS. On appeal, the appellant argues that the judge erred in failing to place the onus on the respondent to establish disclosure and consent to the conflicted transactions and in applying the conflict of interest provisions in the Business Corporations Act rather than the common law of fiduciary obligations. Held: Appeal dismissed.

The judge did not err in concluding that the conflict of interest provisions of the Business Corporations Act governed the claim concerning the TCS transactions. The trial judge made important findings of fact about disclosure of the transactions and how SDSI was to be compensated for that work. She concluded that the impugned transactions were procedurally and substantively fair to SDSI. The appellant is unable to demonstrate any error in the judge's findings of fact or her application of the legal principles. Given the judge's findings of fact, the question of onus is not relevant.

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Reasons for Judgment of the Honourable Mr. Justice Butler:

Introduction

- [1] The appellant, Sonic Holdings Ltd. ("Sonic")--a company owned by Raymond Roussy--appeals the dismissal of its action against Thomas Savage for breach of fiduciary duties owed as a director and officer of Sonic Drill Systems Inc. ("SDSI"). In 2003, Mr. Roussy and Mr. Savage incorporated SDSI to manufacture drilling rigs made with sonic drill heads made by Sonic. They agreed to be equal shareholders in SDSI, through personal corporations, and to share in profits and losses equally. They also agreed that Mr. Savage would control SDSI's day-to-day operations as president and general manager.
- [2] In 2014, SDSI went into bankruptcy. Sonic, Mr. Roussy's operating company, brought the present action in 2015 as a creditor of SDSI, having obtained an order granting him leave to do so under s. 38 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. Sonic alleged, inter alia, that Mr. Savage had misappropriated resources for use by a separate company he owned, TCS Industries Ltd. ("TCS"). The main allegations relevant to this appeal relate to a series of transactions, described as "filler jobs", performed by SDSI for TCS, for which TCS was to reimburse SDSI at cost plus a 20% markup (the "TCS Transactions"). Sonic alleged that Mr. Savage failed to maintain proper oversight and adequate financial records for SDSI, to properly invoice TCS for products constructed at SDSI's facility, and that TCS failed to fully pay SDSI for that work. Sonic sought a disgorgement of profits.
- [3] At trial, the judge dismissed Sonic's claims, finding that Mr. Savage had established a defence to the fiduciary claims under the conflict of interest provisions of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA]. She further held that Mr. Savage had not breached his duty of care to SDSI in any respect: 2019 BCSC 1669 (the "Reasons").

- [4] On appeal, Sonic says the judge erred by failing to place the onus on Mr. Savage to establish disclosure and consent to the conflicted TCS Transactions. Further, Sonic submits the judge erred in applying the conflict of interest provisions in the BCA rather than the common law of fiduciary obligations. However, Sonic submits that under either the BCA or at common law, the onus was on Mr. Savage to demonstrate that the impugned transactions were fair and reasonable to SDSI, both procedurally and substantively. Sonic argues the judge could not have found that the TCS Transactions were procedurally or substantively fair had she applied the proper onus.
- [5] In its factum, Sonic sought disgorgement of the profits earned by TCS on the impugned transactions, but at the hearing of the appeal, counsel indicated that Sonic was not pursuing that remedy directly. Instead, Sonic is seeking a declaration that Mr. Savage acted in breach of his fiduciary duty to SDSI; an order that the matter be remitted to the trial court for an accounting to determine whether the 20% markup was met on each transaction; and, if not, the amount to be awarded.
- [6] As explained below, it is my view that Sonic's attempt to raise an issue of law based on the judge's alleged failure to place the onus on Mr. Savage cannot succeed. The judge applied the correct legal principles and made important findings of fact that fully support her conclusions. Mr. Roussy denied the existence of any agreement about how the TCS Transactions were to be accounted for and alleged that he was a silent partner in SDSI with little or no knowledge of the financial aspects of the business. The judge rejected Mr. Roussy's evidence on these key allegations. She found that Mr. Roussy agreed that SDSI would carry out the TCS Transactions for the agreed compensation of cost plus 20% and that Mr. Roussy was involved in and aware of the financial operations of the business on an ongoing basis. Sonic's claim that the TCS Transactions were not substantively fair to SDSI was founded on the expert evidence of Parveen Sidhu, a forensic accountant. The judge rejected her evidence and relied on the evidence of Richard Pallen, the forensic accountant called by Mr. Savage, to conclude that the TCS Transactions were substantively fair: no profit was diverted to TCS from SDSI, TCS compensated SDSI reasonably for the work done, and SDSI earned in excess of the expected 20% margin. Given the trial judge's clear findings, the question of onus is not relevant. Further, the judge was correct to conclude that the conflict of interest provisions of the BCA governed the TCS Transactions.
- [7] For the reasons that follow, I would dismiss the appeal.

Background

- [8] Mr. Roussy and Mr. Savage met in the 1970s while working in the sonic technology development group at the company Hawker Siddeley. Mr. Savage left in 1980 to start TCS. Mr. Roussy left to work at an energy company for which Mr. Savage, through TCS, performed machine design services. Their relationship continued through the 1980s and 1990s, with Mr. Roussy hiring Mr. Savage to convert his drawings of sonic drill equipment into a digitized format.
- [9] In the early 2000s, Mr. Roussy and Mr. Savage decided to form SDSI to design and manufacture drilling rigs equipped with a sonic drill head designed by Mr. Roussy for sale to customers in construction and other industries. SDSI was eventually incorporated in 2003 with Jenor Steel Inc. (Mr. Savage's holding company) and 466372 B.C. Ltd. (Mr. Roussy's holding company) as equal shareholders. While Mr. Roussy testified that he was the "silent partner" and that Mr. Savage was to run the company without his involvement or interference, the judge did not accept that characterization of Mr. Roussy's participation in SDSI.
- [10] SDSI began operations in Surrey, with Mr. Roussy and Mr. Savage discussing company matters regularly. As they had anticipated, they were unable to obtain a steady flow of drill rig sales, resulting in an irregular work flow. Mr. Savage testified that he and Mr. Roussy discussed the possibility of "filler jobs" to smooth out these irregularities. Mr. Savage offered TCS' railway equipment jobs to help with the work flow irregularities and Mr. Roussy offered drill head jobs from Sonic. Specifically, Mr. Savage recalled discussing with Mr. Roussy on multiple occasions by telephone that TCS would pay SDSI at cost plus 20% for its railway equipment jobs. Mr. Roussy testified that he recalled conversations about work flow and filler jobs but not about TCS' work or a markup. The number two employee at SDSI, Kevin Reimer, also testified to discussions about filler jobs with Mr. Savage and that SDSI regularly used such jobs to smooth out work flow irregularities.
- [11] The judge found the evidence of Richard Bublitz to be persuasive regarding the company's plan for filler jobs, including the TCS Transactions. He was a chartered accountant with Deloitte and became the audit partner for SDSI. When they were in the process of setting up the company, Mr. Roussy and Mr. Savage met in the fall of 2002 with Mr. Bublitz. The judge summarized Mr. Bublitz's recollection of the meeting:
- [85] Mr. Bublitz recalled a discussion at the Meeting about Mr. Savage's existing business. He recalled being told that Mr. Savage engineered and built railway cranes through TCS for some of his existing customers. Mr. Savage and Mr. Roussy discussed the possibility of using "filler jobs" to address gaps in SDSI's workflow. To address this shortcoming, Mr. Savage suggested diverting some of TCS's railway work through SDSI at a cost plus 20% margin. This was the margin that applied to SDSI's sonic drill work.

[86] Mr. Bublitz was not aware of what would have been a reasonable margin for the manufacture of drilling rigs. It appeared to him that Mr. Roussy and Mr. Savage had discussed the margin before the Meeting.

[Emphasis added.]

[12] It is worth noting that the value of the TCS Transactions was not a significant part of SDSI's total sales. According to Mr. Pallen, the TCS Transactions amounted to approximately 4% of sales from 2005-2013. The parties agreed that SDSI would also perform filler jobs for Mr. Roussy's operating company. The total value of the filler work performed for Mr. Roussy's company was approximately 13% of total sales in that period.

[13] In late 2004 or 2005, SDSI moved to a large location in Surrey. Mr. Savage hired his son, Trevor Savage, to perform IT services but later his work expanded to include a wide variety of additional roles, including human relations, sales and customer relations. During this time, Mr. Savage testified that he continued to discuss the TCS Transactions with Mr. Roussy, who voiced no objections to the arrangement.

[14] In early 2007, Mr. Savage hired his daughter, Jennifer Savage, as a bookkeeper. Later that year, SDSI moved to a new location in Chilliwack. There, Mr. Savage said that he met less frequently with Mr. Roussy in person, as it was farther from Mr. Roussy's home, but that they continued to discuss the filler jobs by phone. Mr. Roussy testified that there was little discussion of filler jobs until 2010, when he noticed equipment at the Chilliwack facility that he did not recognize. As Mr. Roussy became more involved in SDSI's affairs after 2010, he saw similar projects in SDSI's shop on at least two or three more occasions.

[15] In April 2011, Mr. Savage advocated for the hiring of a financial controller to take over various tasks which he had been handling until that point. He felt that SDSI's business was becoming more complicated financially and they needed someone with more experience in these areas. Mr. Roussy was not in favour of the proposal and ultimately his view prevailed and SDSI did not hire a financial controller.

[16] Mr. Roussy testified that he first became aware of SDSI's serious financial issues in mid-2012, when he received a message from an overseas customer who claimed it had an overdue account. The relationship between Mr. Roussy and Mr. Savage began to deteriorate, and they communicated by lengthy, often acrimonious, email exchanges instead of by telephone. According to Mr. Roussy, he began to suspect that Mr. Savage had used SDSI to do work and manufacture items for TCS without keeping proper records or fairly compensating SDSI. He also took issue with reimbursements given to Mr. Savage and his children, who remained SDSI employees.

- [17] In April 2013, Mr. Savage terminated Mr. Reimer's employment, as he had started a new business the year prior which Mr. Savage believed was interfering with his work at SDSI. Mr. Roussy immediately hired him back, after which Mr. Reimer no longer took directions from Mr. Savage. According to Mr. Savage, Mr. Reimer took active steps to interfere with his management, including preventing him from accessing materials relating to active drill rig sales and blocking his contact with employees.
- [18] SDSI's accounting practices were the subject of considerable dispute at trial. Its accounting software was not always up to date and entries were sometimes allocated under incorrect job numbers. Labour hours were not always entered and, on two occasions, historical data was cleared from the software (in 2006 and 2010) in order to increase the speed at which the program functioned (though they were backed up before being deleted). Deloitte provided external audit services and received accounting and other information at year-end.
- [19] In November 2013, a receiver was appointed over SDSI's assets. SDSI was formally assigned into bankruptcy in March 2014 with debts of approximately \$4,000,000. The parties' evidence about the reasons for SDSI's failure differed considerably.
- [20] Mr. Savage testified to a number of challenges faced by SDSI, including: the cost of their drill rigs with sonic technology compared to traditional rotary drill rigs; competition with larger companies for employees; ongoing design and engineering costs in developing several models of drill rigs; an expanded product line which incurred further costs and led to warranty claims; secondary market competition from used rigs; increased overhead, particularly at the Chilliwack facility; and fluctuations in the Canada-US exchange rate. He also noted that Mr. Roussy restricted SDSI from selling drill rigs for use in British Columbia in order to protect his contracting company, Sonic Drilling Ltd. Further, in April 2013, Mr. Roussy discontinued the practice of allowing SDSI to sell drill heads directly to end consumers, which reduced the commissions received on each transaction at a time when SDSI was facing significant cash flow issues. From March to April 2013, a series of six transfers of \$50,000 were made from SDSI to Sonic. Mr. Savage stated that these transfers were made with his knowledge but at Mr. Roussy's request.
- [21] Mr. Bublitz testified that SDSI's profit margins decreased over time due to market competition and exchange rate issues with the US dollar.
- [22] Mr. Roussy's evidence, by contrast, was that SDSI failed because of Mr. Savage's fraud and mismanagement. On cross-examination, he acknowledged an email dated June 1, 2011, in which he wrote that "over time, with better machines and better tooling, we will eventually be able to return to profitability but until then we have to be extremely careful with our finances so that we don't go out of business altogether." He stated that he had "seriously considered that option a number of times" in the preceding years. However, Mr. Roussy concluded that the business was sound and the poor management by Mr. Savage was the reason for its failure.

Procedural History

- [23] On March 10, 2015, Sonic, Mr. Roussy, and 466372 B.C. Ltd. filed a notice of civil claim against Mr. Savage, his wife, children, daughter-in-law, TCS, and Jenor Steel Inc. alleging that Mr. Savage breached fiduciary and trust duties owed to the plaintiffs. The defendants filed a response and counterclaim on April 13, 2015. The trial judge referred to this as the "Roussy Action", which is not the subject of the present appeal.
- [24] On November 2, 2015, Master Muir granted Sonic leave to commence an action against Mr. Savage pursuant to s. 38 of the BIA. Sonic filed a notice of civil claim on November 5, 2015, in what the trial judge deemed the "Bankruptcy Action". In that action, now the subject of this appeal, Sonic, as a creditor of SDSI, alleged that Mr. Savage breached his fiduciary and trust duties owed to SDSI:
7. In breach of his fiduciary and trust duties to SDSI Savage engaged in a number of inappropriate activities which include but are not limited to:
 - (a) using SDSI facilities, materials and personnel for the design and construction of products sold by TCS;
 - (b) failing to maintain proper accounts, or any at all, of the extent to which Savage or any corporate entity controlled by him made use of SDSI facilities, materials and personnel;
 - (c) failing to invoice TCS in full for products constructed at the SDSI facility;
 - (d) failing to properly remunerate SDSI for products constructed at its facility with its materials and personnel;
 - (e) causing SDSI to put his children on the payroll without ensuring they had the necessary qualifications and training to perform the duties given them;
 - (f) causing SDSI to pay wages, salaries and other benefits to his children that greatly exceeded the true value of the work performed for SDSI, and causing SDSI to pay wages, salaries and other benefits to his children for work done on behalf of TCS;
 - (g) failing to maintain the level of supervision and oversight of the day-to-day business of SDSI that is commensurate with the executive position held by Savage;
 - (h) providing false financial information to the SDSI external accountants, and its principle lender, the Royal Bank of Canada; and
 - (i) misappropriating for his own use and/or benefit materials and equipment owned by SDSI.

(I note that the judge correctly identified the allegations in sub-paragraphs (a)-(d), and (i) as relevant to Mr. Savage's alleged conflict of interest with SDSI: Reasons at para. 414. For clarity, I note the differences in the two actions. In the Roussy Action, the plaintiffs claimed that Mr. Savage breached fiduciary and trust duties owed to the plaintiffs directly. In the Bankruptcy Action, the subject of the present appeal, Sonic alleges that Mr. Savage breached fiduciary and trust duties owed to SDSI, i.e., as a director and officer of the company.)

[25] Both actions were heard together over 20 days in January-March 2019.

Reasons Below

[26] In reasons pronounced October 1, 2019, Justice Watchuk dismissed both actions in their entirety.

[27] In the Roussy Action, the judge found that Mr. Savage owed no fiduciary duty to the individual plaintiffs separate from the duties he owed to SDSI. She accordingly dismissed the action, relying on the well-known rule in *Foss v. Harbottle* (1843), 67 E.R. 189 (Ch.) that a shareholder may not sue for wrong done to a company (see also: *Robak Industries Ltd. v. Gardner*, 2007 BCCA 61 at para. 4). In October 2019, the plaintiffs filed a notice of appeal but have not pursued that appeal. On April 30, 2021, the appeal was placed on the inactive list pursuant to s. 25(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77.

Bankruptcy Action

Expert Evidence

[28] After describing the background, the judge summarized the evidence of Mr. Savage and Mr. Roussy's respective accounting experts. Ms. Sidhu opined that SDSI's financial statements for the fiscal year 2012 contained material misstatements designed to mislead the bank. She also found that inventory balances and work in progress were overstated as a "plug" to manipulate financial statement ratios, i.e., a way of inflating numbers to keep margins consistent. She also opined that SDSI transfers to Mr. Savage's company, TCS, exceeded those flowing in the other direction; that Mr. Savage and his children had been overpaid; and questioned a shareholder loan paid directly to Mr. Savage from SDSI even though he himself was not a shareholder. With regard to the 20% markup on the TCS Transactions, she expressed the opinion that the gross profit earned by SDSI was 6% and concluded that over \$3,000,000 in gross profit earned by TCS belonged to SDSI.

[29] These conclusions were rebutted by the respondent's expert, Mr. Pallen, who took issue with Ms. Sidhu's various accounting methodologies. He opined that no profit was diverted to TCS from SDSI; no overpayment was made to Mr. Savage or related entities; and that Ms. Sidhu had overstated TCS' gross profit margins and understated SDSI's work in progress. Importantly, he was of the opinion that TCS compensated SDSI reasonably for the work done and SDSI earned in excess of the 20% margin expected.

Legal Principles

- [30] The judge discussed the applicable law, explaining the basis for the Bankruptcy Act and the fiduciary obligation owed by directors of a corporation as follows:
- [306] It is well-settled law that the director of a corporation owes a fiduciary duty to the corporation. This duty is codified in s. 142(1)(a) of the Business Corporations Act
- [307] This duty is owed to the corporation alone, not its shareholders, creditors, or any other stakeholders. The fiduciary duty of directors does not change when a corporation is in the nebulous "vicinity of insolvency" or under any other circumstances. At all times, directors owe their fiduciary obligations to the corporation: *Peoples Department Stores Inc. Trustee Co. v. Wise*, 2004 SCC 68 at paras. 43, 46.
- [308] A shareholder may claim on behalf of the corporation for breach of a fiduciary duty, but only by means of a derivative action. A creditor, similarly, may claim on behalf of the corporation under the Bankruptcy and Insolvency Act. In both cases, however, the shareholder or creditor in effect steps into the shoes of the corporation. As such, it is as if the corporation is acting on its own behalf. The rule in *Foss v. Harbottle*, accordingly, does not apply.
- [31] The judge noted the Supreme Court of Canada's comments in *Peoples Department Store Inc. (Trustee of) v. Wise*, 2004 SCC 68 and in earlier cases on directors' duties to avoid conflicts of interest. She found that an important corollary of this principle is the obligation of directors to disclose material information and obtain informed consent where their own interests may conflict with their duty to the corporation, citing *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para. 148.
- [32] The judge held that the "common law concerning conflicts of interest is codified in Division 3 of Part 5 of the BCA", which constitutes a "complete code for the purposes of identifying the circumstances under which a director will be required to account for profits": Reasons at para. 313. Under s. 148, a director is liable to account for any profit they receive as a result of a contract or transaction in which they have a "disclosable interest", unless it is disclosed and approved as per that section. However, the judge noted that the requirements of s. 150(2) operate as a pre-condition to obtaining relief, in limiting liability to "transactions which were substantively and procedurally unfair to the corporation": Reasons at para. 316.
- [33] Separately, directors also owe a duty of care codified in s. 142(1)(b) of the BCA. However, courts will generally defer to the decisions of directors under the business judgment or business management rule.

Analysis

[34] In her analysis, the judge made a number of findings of fact in the context of the Roussy Action which are relevant to her disposition of the Bankruptcy Action and this appeal. I would summarize these below:

- "Mr. Roussy was not the silent partner [in SDSI] he describes himself to be": Reasons at para. 370;

- "I agree that the following evidence illustrates that Mr. Roussy had knowledge of the financial situation of SDSI throughout its operations from 2003 to 2013": Reasons at para. 371. This conclusion was based on Mr. Roussy admitting to receiving, or having access to, the following information:

- (a) either Tom or Jennifer started sending him bank statements in the last few years of SDSI's existence;
- (b) he and Tom regularly discussed money and financial issues having to do with SDSI, and he admitted that money was always a serious subject;
- (c) he and Mr. Savage discussed customers and sales;
- (d) If Mr. Roussy wanted financial information for SDSI, he would just ask Tom for it;
- (e) Mr. Roussy requested a back-up of SDSI's Simply Accounting data in 2006. Mr. Roussy confirmed that he would have picked this back-up up and supplied it to his bookkeeper to load onto his computer;
- (f) Mr. Roussy admitted he could have access to SDSI's Simply Accounting data at any time he wished;
- (g) Mr. Roussy attended most of SDSI's year-end meetings with Deloitte where SDSI's finances were discussed; and
- (h) Mr. Roussy admitted that if he needed financial information about SDSI, he could have gone to Deloitte and obtained it.

- "Mr. Roussy had the ability to access the internal accounting program of SDSI at any time": Reasons at para. 379;

- "With regard to Mr. Roussy's credibility I also conclude that, although he intended to be truthful, his passion for SDSI and the emotional impact of his intense disappointment and frustration with the failure of the business at times clouded his memory and interfered with his intention to tell the truth": Reasons at para. 380;

· "I found the evidence of Mr. Savage to be at times evasive. In the result, however, I generally accept his evidence, and with regard to the reconstructions and inconsistencies will have regard for the other evidence, documents and testimony, by which to test it and make the necessary findings of fact": Reasons at para. 384;

· "The documentary evidence shows Mr. Roussy was an active participant in SDSI's financial matters. Mr. Roussy was aware of the state of SDSI's bookkeeping and the quality of its accounting records. Mr. Roussy actively participated in instructing SDSI's external accountants. Mr. Roussy also instructed SDSI's internal bookkeeping personnel on occasion. Mr. Roussy admitted to having input as to whether or not SDSI should declare a profit in any given year": Reasons at para. 389;

· "I conclude that Mr. Roussy had ongoing knowledge of and access to the financial situation of SDSI. He was present at the year-end meetings at Deloitte and could participate. He knew, particularly by virtue of the delay in paying Sonic for drill heads, that SDSI was behind in its obligations": Reasons at para. 390; and

· "[the evidence] suggests that Mr. Roussy was well aware of SDSI's financial situation. To the extent he was not aware, he possessed the means of finding out": Reasons at para. 392.

[Emphasis added.]

[35] The judge affirmed many of these conclusions in the context of her analysis of the Bankruptcy Action specifically:

· "I accept [Mr. Bublitz's] evidence in its entirety. That SDSI would manufacture equipment for TCS at a 20% mark-up was disclosed, discussed and planned in 2002": Reasons at para. 420;

· "I therefore find that Mr. Roussy as the president and director of the other 50% shareholder of SDSI, knew at the outset that SDSI would perform manufacturing projects for TCS and that SDSI would be compensated by a 20% mark-up": Reasons at para. 421;

· "In addition, throughout the years from 2003 to 2012 Mr. Roussy not only had access to the accounting records of SDSI, but was provided with the year-end financial statements of SDSI. At annual meetings with the company's accountants, the accountants would review the statements in detail, with reference to inter-company [transactions]. That Mr. Roussy raised no objections until 2012 leads to the conclusion that he consented to the TCS -- SDSI business arrangement, at least until that late date": Reasons at para. 422; and

· "I conclude that Mr. Roussy had knowledge throughout that SDSI was performing filler jobs, and that TCS was the customer. As such, Mr. Savage did not make formal disclosure to Mr. Roussy, but continued to discuss and refer to the TCS jobs with the understanding that there was no issue with that aspect of the business of SDSI": Reasons at para. 423.

- [36] On this basis, and as a result of Mr. Roussy's knowledge of the TCS Transactions--"which he possessed by virtue of the accounting information to which he had access as well as frequent conversations with Mr. Savage"--the judge held that the arrangements were procedurally fair to SDSI: Reasons at para. 425.
- [37] Turning to the issue of substantive fairness, the judge preferred the evidence of Mr. Pallen, Mr. Savage's expert. She was critical of Ms. Sidhu's approach as she did not interview Mr. Roussy, but inappropriately drew her own conclusions from a review of transcripts that had been provided to her. The judge found it "difficult to discern the entirety of the factual basis relied upon [by Ms. Sidhu] in preparing her report." She also found that Ms. Sidhu's conclusions that management of SDSI manipulated inventory and work in progress were without foundation: Reasons at paras. 431-432. She concluded:
- [435] Overall, the methodology of Ms. Sidhu in this regard was highly generalised, oversimplistic and lacked an understanding of the business of SDSI. The result was reflective of Mr. Roussy's view of the profit lost rather than an in-depth accounting analysis. I cannot therefore attribute weight to her conclusions regarding the extrapolation of earnings.
- [38] Both experts commented on the poor state of the accounting records of SDSI, which contained shortcomings in detail and consistency. However, Mr. Pallen had access to more of the historical documents of TCS than Ms. Sidhu and also relied on the final report of the Receiver in Bankruptcy. With that additional information, Mr. Pallen found Ms. Sidhu's conclusions--on profit being diverted to TCS, overpayments to Mr. Savage, and overstatements of inventory and work in progress--to be unsupported. The judge also noted that Ms. Sidhu was unaware of the increase to the management fees charged by Mr. Savage and that she relied on incorrect assumptions about the costs of building and net income received from each rig: Reasons at paras. 432-435.
- [39] On this basis, the judge concluded that the TCS Transactions were substantively fair to SDSI:
- [442] I accept the entirety of the conclusions of Mr. Pallen. Based on those conclusions I find that the transactions between TCS and SDSI were substantially fair and reasonable to SDSI. The 20% mark-up which was planned prior to the incorporation of SDSI and disclosed to Mr. Roussy at the time of the meeting with the accountant in 2002 was, in the result, achieved.
- [443] Having concluded that the transactions were procedurally and substantively fair to SDSI, Mr. Savage has established, pursuant to s. 150(2)(a) of the BCA, a defence to the claim against him for an accounting of profits and disgorgement of profits. This aspect of the Bankruptcy Action is therefore dismissed.

[40] Turning to duty of care, the judge then considered Sonic's allegations that Mr. Savage had breached his duty by hiring his children; overpaying them; overpaying accounting fees; inadequately supervising the manufacturing operations of SDSI; and providing false financial information. She dismissed the claims, relying in part on the business management rule in finding that Mr. Savage's decisions were reasonable at the time they were made.

Issues

[41] On appeal, Sonic submits that the judge erred in failing to recognize the onus on a fiduciary who has a conflict of interest to establish that he did not breach his fiduciary duties. It draws a distinction between disclosable interests in a discrete contract or transaction (to which it concedes that the BCA serves as a complete code) with broader conflicts of office. Alternatively, even if the conflicts of interest provisions in the BCA are applicable, Sonic says that the judge misapplied the provisions by failing to place the onus on Mr. Savage to prove with clear evidence that the TCS Transactions were procedurally and substantively fair to SDSI.

[42] In my view, the issues on appeal all concern Mr. Savage's fiduciary duty of loyalty to SDSI. This is consistent with the position Sonic took at trial. Sonic did not pursue a remedy in damages generally against Mr. Savage for breach of trust and fiduciary duty. Rather, it sought an accounting of profits made or benefits received by him (including the disgorgement of TCS' profits) resulting from Mr. Savage's breach of trust and fiduciary duties: Reasons at paras. 44-45. Further, Sonic does not directly challenge the judge's findings with respect to Mr. Savage's duty of care. Accordingly, I will address the following issues:

- a) Did the judge err in addressing Sonic's claims under the provisions of the BCA?
- b) Did the judge err in failing to place the onus of proof on Mr. Savage?
- c) Did the judge err in finding that the transactions were procedurally and substantively fair and reasonable to SDSI?

[43] I will outline the relevant statutory framework and the positions of the parties before beginning my analysis.

Statutory Framework

[44] The duties of directors and officers are stated in s. 142(1) of the BCA:

142(1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must

- (a) act honestly and in good faith with a view to the best interests of the company.
- (b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances.

[45] Division 3 of Part 5 of the BCA ("Division 3") addresses corporate conflicts of interest. Under s. 147, a disclosable interest is defined as follows:

147(1) For the purposes of this Division, a director or senior officer of a company holds a disclosable interest in a contract or transaction if

- (a) the contract or transaction is material to the company,
- (b) the company has entered, or proposes to enter, into the contract or transaction, and
- (c) either of the following applies to the director or senior officer:
 - (i) the director or senior officer has a material interest in the contract or transaction;
 - (ii) the director or senior officer is a director or senior officer of, or has a material interest in, a person who has a material interest in the contract or transaction.

[46] Section 148 states the obligation of a director or officer to account for profits:

148(1) Subject to subsection (2) and unless the court orders otherwise under section 150 (1) (a), a director or senior officer of a company is liable to account to the company for any profit that accrues to the director or senior officer under or as a result of a contract or transaction in which the director or senior officer holds a disclosable interest.

(2) A director or senior officer of a company is not liable to account for and may retain the profit referred to in subsection (1) of this section in any of the following circumstances:

- (a) the disclosable interest was disclosed before the coming into force of this Act under the former Companies Act that was in force at the time of the disclosure, and, after that disclosure, the contract or transaction is approved in accordance with section 149 of this Act, other than section 149 (3);
- (b) the contract or transaction is approved by the directors in accordance with section 149, other than section 149 (3), after the nature and extent of the disclosable interest has been disclosed to the directors;
- (c) the contract or transaction is approved by a special resolution in accordance with section 149, after the nature and extent of the disclosable interest has been disclosed to the shareholders entitled to vote on that resolution;
- (4) A general statement in writing provided to a company by a director or senior officer of the company is a sufficient disclosure of a disclosable interest for the purpose of this Division in relation to any contract or transaction that the company has entered into or proposes to enter into with a person if the statement declares that the director or senior officer is a director or senior officer of, or has a material interest in, the person with whom the company has entered, or proposes to enter, into the contract or transaction.

[Emphasis added.]

[47] Section 150(1) and (2), set out the powers of the court where a director or senior officer has a disclosable interest in a contract or transaction:

150(1) On an application by a company or by a director, senior officer, shareholder or beneficial owner of shares of the company, the court may, if it determines that a contract or transaction in which a director or senior officer has a disclosable interest was fair and reasonable to the company,

- (a) order that the director or senior officer is not liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction, and
- (b) make any other order that the court considers appropriate.

150(2) Unless a contract or transaction in which a director or senior officer has a disclosable interest has been approved in accordance with section 148 (2), the court may, on an application by the company or by a director, senior officer, shareholder or beneficial owner of shares of the company, make one or more of the following orders if the court determines that the contract or transaction was not fair and reasonable to the company:

- (a) enjoin the company from entering into the proposed contract or transaction;
- (b) order that the director or senior officer is liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction;
- (c) make any other order that the court considers appropriate.

[48] Section 151 states that a contract or transaction with a company is not invalid merely because:

- (a) a director or senior officer of the company has an interest, direct or indirect, in the contract or transaction,
- (b) a director or senior officer of the company has not disclosed an interest he or she has in the contract or transaction, or
- (c) the directors or shareholders of the company have not approved the contract or transaction in which a director or senior officer of the company has an interest.

[49] Under Section 152:

152 Except as is provided in this Division, a director or senior officer of a company has no obligation to

- (a) disclose any direct or indirect interest that the director or senior officer has in a contract or transaction, or
- (b) subject to section 192, account for any profit that accrues to the director or senior officer under or as a result of a contract or transaction in which the director or senior officer has a disclosable interest.

[Emphasis added.]

[50] Section 153 discusses conflicts of office or property:

153(1) If a director or senior officer of a company holds any office or possesses any property, right or interest that could result, directly or indirectly, in the creation of a duty or interest that materially conflicts with that individual's duty or interest as a director or senior officer of the company, the director or senior officer must disclose, in accordance with this section, the nature and extent of the conflict.

Positions of the Parties

Sonic

- [51] The appellant submits it is settled that once a prima facie case is made that a fiduciary has a material conflict of interest, the fiduciary bears a substantive onus to show that they disclosed the conflict and received informed consent from the beneficiary (citing Sharbern). It says that this Court recently confirmed the shifting onus in *Louie v. Louie*, 2015 BCCA 247, in which Justice Newbury noted authorities to the effect that "once a prima facie case of conflict of interest has been shown, the onus generally shifts to the defendant to show that he or she was acting in the best interests of the plaintiff": at para. 21. The "strict ethic" precluding a fiduciary from profiting from his position, and shifted burden, is premised on the degree of control afforded to directors and officers of corporations.
- [52] While the degree of disclosure required depends on the context, a director has a positive duty to make disclosure. In *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.), aff'd (2004) 250 D.L.R. (4th) 526 (Ont. C.A.), Justice Lax noted that it is "no answer to the duty to disclose to say the directors could have discovered this for themselves": at para. 116. Further, even after such disclosure, the director must still act honestly and in good faith with a view to the best interests of the corporation.
- [53] In this case, Sonic says the judge easily found that Mr. Savage had a "disclosable interest" and that a prima facie case of conflict existed. However, she did not place any burden on Mr. Savage, instead analyzing the appellant's claims under the conflicts of interest provisions found in the BCA.
- [54] Regarding the BCA, Sonic submits that the conflicts provisions are only a complete code when the conflict arises with regard to a specific contract or transaction. For other conflicts "of office or property", a different standard of disclosure is mandated. In this case, Mr. Savage had a conflict of office between his role as director and president of SDSI and his similar roles at TCS, as well as through his personal relationship to his children as employees. Sonic characterizes Mr. Savage's breach of loyalty as not relating to a particular "transaction" but in "consistently misappropriat[ing] SDSI's materials and [labour], without proper disclosure to and consent from the rest of SDSI's board (being Mr. Roussy), without keeping proper accounts of the materials and labour used, and without properly

remunerating SDSI".

- [55] In the alternative, Sonic argues that the judge misapplied the conflict of interest provisions of the BCA. It says that she considered whether the TCS Transactions were unfair or unreasonable as the test to be met, rather than requiring Mr. Savage to show clear evidence of his disclosure and Mr. Roussy's consent. Sonic says the question of onus is particularly important in this case given the state of SDSI's accounting records. Citing numerous trial court authorities, the appellant says the question of onus under s. 150(2) is unsettled but that it ought to lie with the conflicted director, who is in a better position to adduce the relevant information. If the judge had applied the proper onus, the appellant says she could not have concluded that the TCS Transactions were procedurally and substantively fair to SDSI.
- [56] Finally, on remedy, Sonic seeks a declaration that Mr. Savage acted in breach of his fiduciary duty to SDSI, an order that the matter be remitted to the trial court for an accounting to determine whether the 20% markup was met on each transaction, and, to determine what amount should be awarded for disgorgement of profits.

Mr. Savage

- [57] As a preliminary matter, Mr. Savage notes that he did not dispute that he had a "disclosable interest" in the TCS Transactions within s. 147 of the BCA; nor that those transactions were not approved in the manner required by s. 148(2) of the BCA, given that corporate governance of SDSI was conducted in an informal manner. However, he submits that the judge did not err in concluding that the TCS Transactions were nonetheless fair and reasonable to SDSI.
- [58] Mr. Savage emphasizes that Sonic does not allege any palpable or overriding errors in the judge's findings or inferences of fact. Rather, Sonic's grounds of appeal relate to his onus, under either the BCA or at common law, to demonstrate that the TCS Transactions were fair and reasonable. He says the appellant casts the 'onus' too broadly, and that the onus remained on Sonic to demonstrate a breach of Mr. Savage's fiduciary duty. He also says that the issue of onus was not material to the judge's decision. He notes in particular the judge's findings at paras. 421-425 about Mr. Roussy's knowledge of the TCS Transactions and 20% markup, and her conclusion at para. 443 that "Mr. Savage has established a defence" pursuant to the BCA, suggesting that she effectively placed the onus on Mr. Savage.
- [59] Further, Mr. Savage disagrees with the appellant's interpretation of *Sharbern*, saying that a fiduciary must only disclose material facts, not every fact associated with a transaction, and further that the Court in that case affirmed the onus on a plaintiff to prove a breach of fiduciary duty. He submits that the language of "except as provided by" in legislation evinces a clear legislative intent that Division 3 stands as a complete code for requiring a director to account for profits. However, whether considered under common law principles or within the framework of the BCA, the judge made positive findings of fact that appropriate disclosure occurred in the circumstances of the case and that Mr. Roussy consented to the

arrangements.

- [60] Mr. Savage submits that the appellant's argument on appeal based on s. 153--that Mr. Savage was in a conflict of office, as distinct from conflicts arising from a discrete contract or transaction--was not pleaded or advanced in the court below. As such, it had no bearing on the judge's analysis of the TCS Transactions. He says that where the remedy sought is a disgorgement of profits (being the aggregate sum of a series of transactions), ss. 147-150 of the BCA govern.
- [61] In essence, Mr. Savage submits that the appellant seeks to rely on the claimed legal error to "invite this Court to retry the case wholesale". He says that the judge's analysis was appropriately directed to the claims advanced and that her findings of fact and credibility should not be disturbed. Lastly, he says that even if the appeal were to be allowed, as disgorgement is a discretionary remedy, the matter should be remitted back to the court below for a determination as to whether it is available.

Analysis

- [62] On appeal, Sonic does not (directly) challenge the judge's findings on whether Mr. Savage breached his duty of care in managing SDSI. Further, counsel advised the Court that Sonic is not seeking any remedy arising from Mr. Savage's alleged breaches with regard to the employment of his children by SDSI. Rather, Sonic focuses on Mr. Savage's fiduciary duty of loyalty--whether he acted honestly and in good faith with a view to the best interests of the corporation, with respect to the TCS Transactions.
- [63] Under s. 150(2) of the BCA, in order for a court to order disgorgement of profits, a contract or transaction must not be fair and reasonable to the company. The parties agree that this is to be assessed both procedurally and substantively, as the judge considered in her analysis. Where they disagree, in essence, is whether the judge should have placed the burden on Mr. Savage to prove that the TCS Transactions were fair and reasonable rather than making her own determination on the evidence before her. Sonic maintains that the question of onus is important in this case because of gaps in the evidence, which it attributes to SDSI's poor management and accounting practices under Mr. Savage's direction.
- [64] Sonic submits that the judge erred when she applied the conflict of interest provisions of the BCA and not the common law. At common law, it submits that the onus on a director or officer to disclose and obtain consent to conflicted transactions is well-established. Alternatively, it submits that the question of onus is unsettled under the BCA but the same onus (on the conflicted director) should apply.

[65] Given these positions, I propose to determine, first, whether the judge erred in analyzing Sonic's claim under the BCA and not the common law; i.e., whether the BCA is a complete code that was properly applied to the contracts or transactions at issue. I would conclude that it is. Second, I will discuss the question of onus under the BCA. Finally, I will consider whether the judge erred in concluding that the transactions between SDSI and TCS were procedurally fair and reasonable.

Did the Judge Err in Analyzing Sonic's Claims Under the BCA?

[66] First, it is necessary to examine the provisions of Division 3 to determine the legislative intent, and whether it is intended to be comprehensive. Under s. 148(1), a director or officer is liable to account for profits accruing to them as a result of a contract or transaction in which they hold a disclosable interest, but is not liable (under subsection (2)) and may retain those profits based on any of an enumerated list of circumstances. This includes approval by the directors in accordance with s. 149 after the nature and extent of the interest is disclosed. Section 149, in turn, states that contracts or transactions may be approved by the directors or by a special resolution. (A director who has a disclosable interest is not entitled to vote.) Again, Mr. Savage does not dispute that his interests in TCS were "disclosable interests" and that ss. 148-149 were not strictly complied with. This was consistent with Mr. Roussy and Mr. Savage's informal corporate governance of SDSI.

[67] Under s. 150(1), on an application by a company or director, officer, shareholder or beneficial owner of shares of the company, the court may, if it determines that a conflicted transaction was fair and reasonable to the company, order that the director or senior officer is not liable to account for profits or make any other order it considers appropriate. Section 150(2) contains the inverse: if the court determines that a contract or transaction was not fair and reasonable to the company, it may enjoin the transaction; make an order that the director or officer is liable to account for profits; or make any other order it considers appropriate.

[68] Section 151 states that a contract or transaction will not be invalid merely because a director or officer has an interest therein, has not disclosed it, or because the directors or shareholders have not approved the contract or transaction. Importantly, s. 152 states (repeated for convenience):

152 Except as is provided in this Division, a director or senior officer of a company has no obligation to

- (a) disclose any direct or indirect interest that the director or senior officer has in a contract or transaction, or
- (b) subject to section 192, account for any profit that accrues to the director or senior officer under or as a result of a contract or transaction in which the director or senior officer has a disclosable interest.

[Emphasis added.]

[69] Lastly, s. 153 discusses conflicts of office or property, to which I will return below.

[70] In my view, the language of s. 152 evinces a legislative intent for the BCA to serve as a complete code governing the contracts or transactions contemplated in Division 3. In *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, the Court noted that the plain and ordinary meaning of the words "except as provided by this Act" are strong markers of legislative intent:

[58] In my opinion, the words of s. 3(1) of the SIA completely oust the common law and international law as a source of potential exceptions to the immunity which it provides. The plain and ordinary meaning of the words "[e]xcept as provided by this Act" is that it is the Act, and the Act alone, that may provide exceptions to the immunity granted pursuant to s. 3(1) of the SIA (*Bouzari*, at para. 57). Words as explicit as "[e]xcept as provided by this Act" demonstrate that Parliament intended for the legislation to displace the common law (*Gendron v. Supply and Services Union of the Public Service Alliance of Canada*, Local 50057, [1990] 1 S.C.R. 1298, at p. 1319). I cannot think of words that could be more "irresistibl[y] clea[r]" (*Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614).

[Emphasis added.]

[71] I would also note that, in similar circumstances, courts in this province and elsewhere have addressed fiduciary duty claims based on the conflicts of interest provisions under the BCA or applicable legislation: see, e.g., *Western Canadian Coal Corp. v. Fawcett*, 2006 BCSC 463; *Witzel Capital Corp. v. LED Medical Diagnostics Inc.*, 2009 BCSC 1000; *Jaguar Financial Corp. v. Alternative Earth Resources Inc.*, 2015 BCSC 2436 [*Jaguar*], rev'd 2016 BCCA 193 [*Jaguar BCCA*]; *Eisler Estate v. GWR Resources Inc.*, 2019 BCSC 1990, aff'd 2021 BCCA 113.

[72] In *Fawcett*, Justice Tysoe stated:

[34] As was observed by Madam Justice Ryan in *Rhyolite [Resources] Inc. v. CanQuest Resource Corporation*...the common law provided that a director could not obtain a profit from a transaction with the company in which he or she had an interest unless the shareholders approved of the transaction after being informed of all material facts. Madam Justice Ryan went on to hold that the predecessors to sections 120, 121 and 122 of the Company Act superseded the common law. As a result, in my view, a director who sought the protection of sections 120 and 121 had to fully comply with the requirements of those sections. This conclusion is reinforced by the mandatory language of those sections. Section 120 set out a mandatory requirement of disclosure in a particular manner and s. 121 provided that a director must account for any profit unless there had been compliance with one of two specific procedures.

[Emphasis added.]

The judge went on to consider whether the impugned transactions in that case were fair and reasonable within s. 150 of the BCA.

[73] More recently in GWR Resources, the trial judge similarly held that Division 3 "is a complete code for the purposes of identifying the circumstances in which a director will be required to account for profits", citing the judge's decision in the case at bar: at para. 217.

[74] I would also refer to the Supreme Court of Canada's decisions in Peoples and B.C.E. Inc. v. 1976 Debenture Holders, 2008 SCC 69. In both cases, the Court considered provisions of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 [CBCA]. In Peoples, at issue was whether the defendants had breached their duties under s. 122(1)(a) of the CBCA, which requires directors and officers to act in good faith and honestly vis-à-vis the corporation. Section 122(1) of the CBCA contains essentially identical language to that of s. 142(1) of the BCA regarding a director's duties of loyalty and care:

122 (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[75] The Court elaborated on the content of the fiduciary duty of loyalty, as quoted by the judge in the case at bar:

[35] The statutory fiduciary duty requires directors and officers to act honestly and in good faith vis-à-vis the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: see K. P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 715.

[76] Importantly, the Court went on to refer to comments of Justice McLachlin in *K.L.B. v. British Columbia*, 2003 SCC 51, a case involving the relationship between the government and foster children. Referring to *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at p. 646, Justice McLachlin noted that where a fiduciary duty is owed, "[t]he obligation imposed [on the fiduciary] may vary in its specific substance depending on the relationship".

[77] In Peoples, the Court found that the "issue to be considered here is the 'specific substance' of the fiduciary duty based on the relationship of directors to corporations under the CBCA": at para. 37 (my emphasis).

[78] This was reinforced in B.C.E., in which the Court again considered fiduciary duties under the CBCA:

[38] The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.

[Emphasis added.]

[79] In my view, these comments affirm that fiduciary duties will necessarily vary depending on the circumstances and must be analyzed in the context of the specific statutory scheme in question; in this case, the BCA.

[80] In this context, I would find that the legislature intended Division 3 to govern conflicts of interest of the sort at issue in the TCS Transactions; that is, contracts or transactions material to the company in which a director or senior officer holds a disclosable interest. Of course, directors and officers owe broader fiduciary duties as codified in s. 142(1) which require them to act honestly and in good faith with a view to the best interests of the company. Those duties include, for example, not appropriating corporate opportunities: see, e.g., *Peso Silver Mines Ltd. v. Cropper*, [1996] S.C.R. 673; *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592. The duty of loyalty is the obligation to put the interests of the principal above the fiduciary's own interests more generally: see, e.g., *Giles v. Westminster Savings Credit Union*, 2007 BCCA 411 at paras. 37-41. But with respect to conflicts of interest arising from specific contracts or transactions, such as the TCS Transactions, ss. 147-153 of the BCA are intended to govern.

[81] The fact that conflicts of interest involving such contracts or transactions are governed by Division 3 does not mean that common law principles are inapplicable. The meaning or interpretation of what is fair and reasonable under s. 150(2), both procedurally and substantively, will necessarily be informed by the common law. Further, Mr. Savage's fiduciary duty to act in the best interests of the corporation went beyond merely abiding by the conflicts provisions in Division 3. But that does not change the applicability of Division 3 to the nature of the conflict of interest that is in issue in this case.

[82] *Sonic* refers to two trial court authorities which it says support its position that fiduciary duty claims are to be addressed under the common law without reference to s. 150 of the BCA. In my view, neither case assists *Sonic's* position or suggests that the BCA is inapplicable in the circumstances of the case at bar. In *Geocomp Data Management Inc. v. International PBX Ventures Ltd.*, 2015 BCSC 302, the judge referred to the director and CEO's fiduciary duties "both at common law and under s. 142 of the Business Corporations Act". He held that the director in that case held a disclosable interest in a contract or transaction,

specifically his continuing remuneration, and failed to disclose the expiry of his management contract in breach of his "fiduciary duties of good faith, honesty and loyalty". Sonic says the director was ordered to "account for his profits" on a quantum meruit basis; however, that is not accurate. Rather, the court found that the director was not entitled to the full amount of his remuneration under the expired contract for the period in question, but allowed him to retain a portion of it calculated on a quantum meruit basis. The company did not advance a claim for an accounting of profits as in the case at bar. It is clear from the judge's reasons that the fiduciary duty claim, and in particular, the claim for breach of the director's duty of loyalty, was considered under the BCA: see paras. 77-82.

- [83] In *Nature-Control Technologies Inc. v. Li*, 2014 BCSC 1868, the plaintiff claimed that the defendant breached his fiduciary duties by diverting a business opportunity to a company he owned indirectly without disclosure and consent. In her succinct review of the fiduciary duties owed by a director to a company, the judge did not refer to the BCA. Rather, she referred to *Sharbern* and *Canadian Aero* for the proposition that "a fiduciary may act in his or her own self-interest provided he or she first fully discloses all material facts and obtains the beneficiary's consent": at para. 197. It is not surprising that the judge did not refer to Division 3 as those provisions were not applicable to the circumstances under consideration. There is a difference between contracts or transactions between Company A and a separate company owned by one of Company A's directors (as in this case); and a director or officer appropriating corporate opportunities gained by virtue of his position at Company A for himself or herself (as in *Nature-Control*). In the latter case, there are no contracts or transactions that Company A "has entered or proposes to enter into" that require disclosure: s. 147, BCA.
- [84] This latter scenario is more analogous to *Canadian Aero*, as opposed to the contracts or transactions contemplated in Division 3 between a company itself and one in which one of its directors or officers holds a "disclosable interest". Again, those provisions of the BCA contemplate a contract or transaction with the company in question. In those circumstances, courts may enjoin a proposed contract or transaction or order the disgorgement of profits if that transaction is not fair or reasonable to the company.
- [85] Lastly, I would not give effect to Sonic's submission that the conflicts at issue in this case are those contemplated by s. 153, such that the provisions of ss. 147-152 do not apply to the transactions between SDSI and TCS.
- [86] There are three reasons why this argument is without merit. First, Sonic raises this argument to support its position that Division 3 does not apply to a series of contracts or transactions. Not only was that argument not raised in the court below, it would lead to an absurd result. The effect of Sonic's argument would be that the BCA would only apply if Mr. Savage had a disclosable interest in a single transaction but would not apply where TCS, the company in which he had a disclosable interest, was involved in a series of contracts or transactions with SDSI. In my view, this would defy logic. There is no principled reason for such a distinction. It is clear that Mr. Savage was required to disclose his interests outside

the company (in accordance with the provisions of Division 3) and that s. 150 must apply to any contracts or transactions in which he had a disclosable interest. However, there is nothing in those provisions that limit the application of those provisions to a single contract or transaction.

- [87] Second, the claim advanced at trial and on appeal was for an accounting of profits from the TCS Transactions including disgorgement of TCS' profits. That claim clearly falls within ss. 147-152 of the BCA. At trial, Sonic did not pursue any claim generally for breaches of trust or duty by Mr. Savage.
- [88] Further, a plain reading of s. 153 states that a director or officer must disclose his interests outside of the company which could directly or indirectly result in a conflict "of office". Sonic did not plead any non-compliance with that section. There is no question that Mr. Savage complied with the requirements of s. 153. Mr. Roussy had full knowledge of Mr. Savage's role with TCS when SDSI was incorporated and began to do business, including the business of entering into the TCS Transactions. Of course, Mr. Roussy also had full knowledge regarding the employment of Mr. Savage's children. It is also worth noting again that Sonic is not seeking any remedy on appeal with respect to the employment of the Savage children.
- [89] Finally, I should note that Mr. Savage objects to this argument being raised for the first time on appeal: see *R. v. Gill*, 2018 BCCA 144 at paras. 9-11. As I would not give effect to Sonic's argument, I need not deal with that submission.
- [90] In summary, I would find that the conflict of interest provisions found in the BCA apply to the impugned TCS Transactions. The judge did not err in analyzing those transactions under Division 3 and in considering whether they were fair and reasonable under s. 150 of the BCA.

Did the Judge Err in Failing to Place the Onus of Proof on Mr. Savage?

- [91] Sonic argues that the judge erred by misapplying the conflict of interest provisions in the BCA "by failing to place the onus on Mr. Savage to show that he did not breach his fiduciary duties". Sonic submits that the judge's reasoning shows that she placed the onus of proof on Sonic, rather than Mr. Savage. Parenthetically, I note that Sonic also argues that the judge failed to require Mr. Savage to "prove with clear evidence that the TCS Transactions were procedurally and substantively fair to SDSI". However, that argument does not concern the question of onus, and I have dealt with it under the third issue, below.
- [92] I would not accede to this ground of appeal. In my view, it fails for a number of related reasons. First, it casts the net of onus in a way that obscures the nature of the inquiry that must be undertaken when considering claims of alleged breaches of fiduciary duty arising from conflicted transactions under Division 3. Second, Sonic does not allege any palpable or overriding errors in the judge's findings or inferences of fact or in her credibility determinations. Those findings readily support the conclusions drawn by the judge and the question of onus, which was not an issue in the court below, was not relevant to her

conclusions. Third, I am of the view that Sonic is unable to demonstrate any error in the judge's approach to the contextual inquiry required to consider its claims, including issues of proof, that had to be undertaken in consideration of Sonic's claims.

[93] As Mr. Savage argues, Sonic's suggestion that the burden rests on a fiduciary to show that he did not breach his fiduciary duties is overly simplistic. To the extent that Sonic suggests it does not bear an onus to prove a fiduciary breach, its argument obscures the analysis. In the first instance, a party claiming a breach of fiduciary duty does bear a burden to prove a breach. However, Sonic's position is correct to the extent that a fiduciary who has an interest in a transaction bears the onus to show informed consent. What is unclear on the existing jurisprudence considering Division 3 is whether the conflicted fiduciary also bears the onus to show that an impugned transaction is fair and reasonable. As I will explain, I am inclined to the view that in such circumstances, generally the fiduciary should bear that onus. However, it is not necessary to decide that issue to resolve this appeal.

[94] I begin by repeating the wording of s. 150(2), which suggests that it is for the court to determine whether a contract or transaction was fair and reasonable:

150(2) Unless a contract or transaction in which a director or senior officer has a disclosable interest has been approved in accordance with section 148 (2), the court may ... make one or more of the following orders if the court determines that the contract or transaction was not fair and reasonable to the company:

[Emphasis added.]

[95] In *Fawcett*, Justice Tysoe noted that a literal interpretation of the wording of s. 150(2) indicates that "the threshold is for the court to determine that the contract was both unfair and unreasonable to the company": at para. 37. However, he later noted that he "tend[ed] to agree with the position" of the petitioners in that case that the onus lay on the conflicted director or officer. He did not need to decide the point because the respondents had proved that the agreement in question was fair and reasonable through the opinions of multiple experts: at para. 44.

[96] I would make a similar observation here. While the BCA is silent on the issue of onus, given the role within the company of a director or senior officer with a disclosable interest in a conflicted transaction, and the nature of the duties owed by a director or senior officer to the company, it is appropriate to place the onus on the fiduciary. Nevertheless, as in *Fawcett*, it is unnecessary to decide the question of onus in this case because the judge clearly concluded after a thorough review of the evidence that the TCS Transactions were not procedurally and substantively unfair and unreasonable to SDSI.

[97] In *Witzel*, the judge similarly declined to address the question of onus after concluding that the share acquisitions in question were not unfair or unreasonable:

- [116] I wish to make it clear that although I have analysed this part of the case from the starting point of LED's argument, I have not reached my conclusion on the basis that it has the onus of proving unfairness or unreasonableness. Onus was not a point which was argued, and I would reach the same conclusion whether the onus was on the plaintiffs or the defendant.
- [98] In *Jaguar*, the trial judge again concluded that he did not need to decide who bore the onus. Regardless of who bore the onus, he determined that the relevant transactions failed to meet the test as fair and reasonable, procedurally or substantively, and made an order enjoining them: at paras. 60-62.
- [99] On appeal, this Court set out the circumstances which must be found for the court to exercise jurisdiction under s. 150(2):
- [70] (1) a director or senior officer must have disclosable interest, (2) the disclosable interest must not have been approved in accordance with s. 148(2) and (3) the proposed transaction must not have been fair and reasonable to the company.
- [Emphasis added.]
- [100] In that case, the Court held that the judge erred at the disclosable interest stage. While it was therefore unnecessary to consider whether the transaction was fair and reasonable, Justice Savage did comment to some extent on the judge's findings, again without formal discussion of onus, but apparently proceeding on the basis that it was for the court to determine whether the transaction was fair and reasonable: see paras. 100-110. In particular, the Court discussed issues with the judge's findings on the evidence before him; whether the transaction was negotiated at arm's length; and expert evidence on substantive fairness, without any mention of a burden on the conflicted party.
- [101] More recently, in *GWR Resources*, Justice Donegan considered a counterclaim by a mining exploration company, GWR Resources Inc., that a former manager of the company breached his fiduciary and statutory duties to it through allegedly fraudulent conduct and by having GWR enter into equipment rental contracts with his separate company. At para. 215, the judge referred to *Ascent One Properties Ltd. v. Liao*, 2017 BCSC 1017, regarding the nature of a director's fiduciary duties:
- [180] In determining whether a director has acted in the best interests of the company, the court will consider whether the director has applied informed judgment which had a reasonable basis: *Maple Leaf Foods Inc. v. Schneider Corp.*, (1998), CanLII 5121 (Ont. C.A.) at p. 42. This "business judgment rule" operates to shield from court intervention business decisions which have been made honestly, prudently, in good faith and on reasonable grounds: *Krynen v. Bugg*, 2003 O.J. No. 1209 (Ont. C.J.) at para. 74(7).

...

[182] The court must scrutinize the circumstances of each case to determine whether the director has acted honestly and in good faith and with a view to the interests of the company. A finding that there was no fraud or dishonesty on the part of a [director] who was attempting to solve the company's problems stands in the way of a finding of breach of fiduciary duty: Peoples Department Stores at paras. 39-40.

[Emphasis added.]

[102] On the facts in *Eisler*, which share a number of similarities with the circumstances of this case, the court dismissed GWR's claim for disgorgement of profits from the equipment rental contracts despite finding that Mr. Eisler failed to comply with the approval provisions of the BCA in respect of the impugned transactions. It noted the context-specific nature of what is fair and reasonable, including the purpose of the contracts in issue and their ramifications to the company. While the directors did not approve of the transactions in the manner prescribed by the BCA, the nature and extent of the transactions were disclosed to the directors in a number of ways. The arrangements were put in place when the company was struggling, and GWR used and benefitted from the services and equipment supplied by Mr. Eisler and his company. The judge found "the defendant has failed to establish that Mr. Eisler breached his fiduciary duty to GWR". However, she was also satisfied that "the transactions were both procedurally and substantively fair and reasonable and that Mr. Eisler is not liable to account for any profits".

[103] While the trial judge in *Eisler* did not discuss onus, it is clear from the reasons and her detailed consideration of the evidence that the question of onus was not relevant to the court's findings regarding s. 150 of the CBA; she had no doubt about that conclusion. The question of onus was not considered on appeal in *Eisler*. However, Justice Grauer noted, at paras. 82-83, that the question of onus is not settled in this province and that "it may well depend on a number of factors, including under which subsection of section 150 the court is acting, and the overall onus where, as here, the onus is on GWR to establish just cause for dismissal and the breaches of fiduciary duty it alleged."

[104] The appellant cites *Sharbern* for the proposition that once a beneficiary has made a *prima facie* case that a defendant fiduciary was in a material conflict of interest, there is a substantive onus placed upon the fiduciary to show that he or she received informed consent. In *Sharbern*, the Court considered a fiduciary's disclosure obligations in the context of the Securities Act, R.S.B.C. 1996, c. 418 [Securities Act] and the Real Estate Act, R.S.B.C. 1996, c. 397 [Real Estate Act]. At issue were "Compensation Differences", being differences in the financial arrangement offered by the Vancouver Airport Centre Ltd. ("VAC") to purchasers of strata lots in a Marriott hotel as compared to those in a Hilton hotel. The plaintiff *Sharbern*, who represented a class of investors who purchased lots in the Hilton hotel from VAC, claimed that VAC was liable for failing to disclose details about the Compensation Differences. It alleged that these differences resulted in an undisclosed conflict of interest, in that they created an incentive for VAC to favour the Marriott over the Hilton in its operation and management of the two hotels (VAC was entitled to a higher

monthly management fee, based on a percentage of gross rental revenue, for the Marriott hotel). At trial, the judge concluded that the undisclosed differences gave rise to a potential conflict of interest and that VAC was liable for breach of fiduciary duty because it did not disclose the conflict. The Supreme Court of Canada upheld this Court's decision overturning the trial decision primarily on the basis that the details of the financial arrangements between the two hotels were not material.

[105] Sonic relies on the following passages:

[148] A breach of fiduciary duty would occur if the undisclosed Compensation Differences were material or placed VAC into a conflict of interest to which Sharbern had not consented. This is because equity "forbids trustees and other fiduciaries from allowing themselves to be placed in ambiguous situations. . . .

[149] Sharbern submits that the question of whether VAC breached its fiduciary duty to avoid undisclosed conflicts of interest was "one of consent" (A.F., at para. 54). That is, Sharbern argues that the Court must ask whether VAC "made sufficient disclosure, in the [Hilton Disclosure Statement], of the facts pertaining to its conflict of interest that investors purchasing under the [Hilton Disclosure Statement] must be taken to have consented to the conflict" (ibid.). Sharbern's position is premised upon the assumption that the Compensation Differences constituted a material fact or information beyond what had already been disclosed. If that were true, then the onus would fall on VAC, as fiduciary, to prove that it had received the informed consent of the Hilton Owners with respect to the Compensation Differences: *McGuire v. Graham* (1908), 11 O.W.R. 999 (C.A.), at pp. 999-1000.

[150] However, the materiality of the Compensation Differences must first be established. This is because "[n]ot every self-interested act by a fiduciary conflicts with his fiduciary duties; otherwise, he could never do anything for his own benefit" (Waters', at p. 914). As stated by F. M. B. Reynolds in *Bowstead and Reynolds on Agency* (17th ed. 2001), at para. 6-057, "[t]he duty does not completely prohibit the adoption of a position or the entering into of transactions in which such a conflict might occur; it rather prohibits doing so without disclosure of all material facts to the principal so as to obtain his consent" (emphasis added). Here, the principal had consented to the agent's conflict of interest -- to act for other principals competing in the same market -- and knew that the agent would be simultaneously acting in the interests of the principal and competitors. The first question that Wedge J. ought to have asked, therefore, was whether the Compensation Differences constituted a material fact or information beyond what had already been disclosed, such as to impose a fiduciary duty upon VAC to disclose their particulars.

[Emphasis added; italics in original.]

[106] In response, Mr. Savage notes Justice Rothstein's comments at the outset of his judgment suggesting that the burden remained on Sharbern to prove a breach of fiduciary duty:

- [3] Two main questions are raised on appeal. The first is whether VAC is liable for alleged misrepresentations contained in the offering memorandum and disclosure statement (the "Hilton Disclosure Statement") that VAC used to sell the Hilton strata lots. The second is whether VAC is liable for breach of fiduciary duty when it acted as manager of the Hilton under an agreement (the "Hotel Asset Management Agreement") entered into between VAC and the Hilton Owners, including Sharbern. In the reasons that follow, I conclude that Sharbern's claims fail on both grounds, and I would dismiss the appeal.
- [8] As to the second question, although VAC, as manager of the Hilton, had fiduciary obligations to Sharbern, Sharbern did not discharge its onus of proving a breach of fiduciary duty. A fiduciary is required to disclose material facts and information, and conflicts of interest. VAC's position of conflict in managing both the Hilton and the Marriott hotels had already been disclosed to Sharbern. The trial judge again failed to consider all the relevant evidence on the issue of materiality that was before her, and Sharbern did not adduce evidence to support a finding that the different financial arrangements constituted material facts or information beyond what had already been disclosed by VAC.

[Emphasis added.]

- [107] I do not disagree with the proposition that once a beneficiary has established that a defendant fiduciary was in a material conflict of interest, there is an onus placed upon the fiduciary to show that he or she received informed consent. However, I am of the view that Sharbern does not support Sonic's broader assertion that Mr. Savage bore the onus of establishing that he did not breach his fiduciary duties. The decision highlights the contextual analysis required when considering alleged breaches of fiduciary duties in different factual and statutory contexts. At issue there were disclosure statements to potential investors, and whether VAC had failed to disclose a potential conflict of interest. The Court held that both the Securities Act and Real Estate Act governed VAC's disclosure obligations, with obligations (and defences) arising under both statutes. It considered the plaintiff's claims within those prescribed statutory contexts and found that the claim failed because the plaintiff failed to establish a breach of fiduciary duty as there was no failure to disclose material facts.
- [108] In this case, there is no question of disclosure obligations in the context of a securities or real estate offering but rather Mr. Savage's obligations as a fiduciary and director/officer of SDSI. In these circumstances, the onus on Sonic, as plaintiff, was to establish that Mr. Savage was in a material conflict of interest (which was not contentious), while Mr. Savage, as defendant, bore the onus of showing that there was informed consent: see *Hutchison v. Moore Estate*, 2021 BCCA 301. The clear statement in para. 8 that Sharbern--as plaintiff--had the onus of proving a breach of fiduciary duty (in other words, to prove materiality of the disclosure), is a direct answer to Sonic's assertion that Mr. Savage--as defendant--bears the onus to show that he did not breach his fiduciary duties. As the Court previously affirmed in *Peoples and B.C.E.*, a fiduciary obligation will vary with context and the specific substance of the transaction at issue as it is considered within the statutory framework.

[109] Sonic also relies on this Court's decision in *Louie*, in which Justice Newbury stated:

[21] The first ground seems, with respect, misconceived: the onus was on the plaintiff to prove that the defendants had not discharged their duty to the Band. The Court found this onus had not been met. I do not regard onus of proof as particularly significant in this case, but there is clear authority to the effect that once a *prima facie* case of conflict of interest has been shown, the onus generally shifts to the defendant to show that he or she was acting in the best interests of the plaintiff (in this case, the Band.) See *James I. Reynolds, A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* at 196-7; *Toronto Party for a Better City v. Toronto (City)* 2013 ONCA 327 at para. 58; *Roberts v. Canada* [1995] F.C.J. No. 1202 at para. 492 (*aff'd* [1999] F.C.J. No. 1529, *aff'd* 2002 SCC 79).

[Emphasis in original.]

[110] Like *Sharbern*, *Louie* does not provide support for Sonic's overly broad characterization of the nature of the onus. That claim arose in a different context than the circumstances of the case at bar. At issue in *Louie* were \$5,000 payments made by members of the Band Council to themselves for past services, with money received from the local regional district for the use of a road across the reserve. The Court decided the issue in consideration of s. 2(3) of the Indian Act, R.S.C. 1985, c. I-5, which requires the consent of a majority of the Band in order to exercise such a power.

[111] What *Louie* does underline is that the question of onus is often not particularly relevant to resolution of the issues that arise in these cases. As in *Louie*, I am of the view that the question of onus was not significant to the decision of the court below and is not significant on this appeal. This is because the judge arrived at conclusions that are unassailable on appeal absent palpable and overriding errors in the judge's fact finding; and no such errors are alleged here. The judge found that Mr. Savage adequately disclosed the TCS Transactions to Mr. Roussy (both initially and on a continuing basis through the informal management practices) and that he consented to the business arrangement. Further, she found that the transactions were procedurally and substantively fair and reasonable to SDSI.

[112] I do not see how the question of onus could impact the judge's conclusions in any way. As Mr. Savage argues, in civil proceedings a court is required to make determinations on the balance of probabilities and there is no question that is what the judge did here. This point was made by Justice Spence in *Arnold v. Teno*, [1978] 2 S.C.R. 287 at 298, where he approved of the following statement of Viscount Dunedin in *Robins v. National Trust Co.*, [1927] 2 D.L.R. 97 at 101 (J.C.P.C.):

But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

- [113] The judge here came to a determinate conclusion and did so while appropriately considering the specific substance of Mr. Savage's duty under the BCA.
- [114] The only support from the language in the Reasons that Sonic offers for its assertion that the judge placed the onus of proof on the plaintiff is the following statement:
- [316] Even if a director is liable to account under s. 148 for failing to disclose a disclosable interest, the requirements of s. 150(2) operate as a pre-condition to obtaining relief from the court. This provision effectively limits a director's liability to those transactions which were substantively and procedurally unfair to the corporation.
- [115] That comment is not a misstatement of onus but an accurate description of the finding the court must make before it can exercise jurisdiction to grant relief.
- [116] A further difficulty with Sonic's argument is that the judge does appear to have placed the onus to establish a defence on Mr. Savage. She found that "Mr. Savage has established a defence to the claim under the BCA conflict of interest provisions. I therefore cannot order an accounting or a disgorgement of profits."
- [117] In conclusion on this issue, I would return again to Peoples, in which the Court examined the content of the fiduciary duty of loyalty under the CBCA. It noted that the appeal was "concerned only with the statutory duties owed under the CBCA" and that "all the circumstances may be scrutinized to determine whether the directors and officers have acted honestly and in good faith with a view to the best interests of the corporation." It further emphasized the trial judge's determination that there was no fraud and dishonesty. In other words, the Court scrutinized the impugned contracts or transactions in "all the circumstances" and in the applicable statutory context.
- [118] In this case, the judge was required to examine the substance of Mr. Savage's fiduciary duty under the BCA. In doing so she recognized that Sonic had established that Mr. Savage was in a position where he had a material conflict of interest regarding the TCS Transactions. She then examined all of the evidence to determine whether the transactions were, or were not, fair and reasonable to SDSI and arrived a "determinate conclusion". She had no doubt about her conclusion that Mr. Savage had "established a defence" to the claim. The approach she took was consistent with the approach taken in Fawcett, Witzel, Jaguar and GWR Resources, as well as the plain language of s. 150. In my view, the judge's approach to the issues raised was correct. I would not give effect to Sonic's grounds of appeal relating to Mr. Savage's onus or burden.

Did the Judge Err in Finding that the Transactions were Procedurally and Substantively Fair and Reasonable to SDSI?

[119] Sonic does not attempt to identify any palpable or overriding errors in the judge's factual findings on the evidence before her. It simply argues that the judge erred in not requiring Mr. Savage to prove "with clear evidence" that the TCS Transactions were procedurally and substantively fair, and presumably, that in applying this burden, he could not do so.

[120] In *Jaguar BCCA*, this Court noted that to exercise jurisdiction under s. 150(2):

[70] (1) a director or senior officer must have disclosable interest, (2) the disclosable interest must not have been approved in accordance with s. 148(2) and (3) the proposed transaction must not have been fair and reasonable to the company.

[Emphasis in original.]

[121] This case turns on (3): whether the TCS Transactions were fair and reasonable to SDSI.

Procedural Fairness

[122] Aside from the issue of burden, the parties do not dispute the applicable legal principles, which the judge summarized at paras. 321-323:

[321] What is or is not fair and reasonable to the company is a context-specific inquiry that depends on all the surrounding circumstances, including the purpose of the agreement and its possible ramifications for the corporation: *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, 2002 CanLII 49507 (ONSC) at para. 193 [UPM].

[322] Procedural fairness "embraces questions of when a transaction was timed, how it was initiated, structured, negotiated, disclosed to directors and how the directors' approval was obtained." Substantive fairness, on the other hand, relates to the content of the contract or transaction: *UPM* at para. 195.

[323] In the case of a closely-held corporation, informal disclosure to shareholders of the contract or transaction can be fair and reasonable from a procedural standpoint: *Nature-Control Technologies Inc. v. Li*, 2014 BCSC 1868, paras. 196-199.

[Emphasis added.]

[123] In my view, the judge correctly noted that a contextual inquiry is required. In this case, the structure of SDSI is highly relevant. Through holding companies, SDSI was owned and operated solely by Mr. Roussy and Mr. Savage, making it a closely-held corporation. The evidence established that they spoke regularly about the business despite Mr. Roussy's characterization of himself as a "silent" partner, especially in the early years after incorporation.

[124] The judge's key findings are made at paras. 421-425 of the Reasons. After accepting Mr. Bublitz's evidence in its entirety, including that a 20% markup for filler jobs was discussed at a pre-incorporation meeting in the fall of 2002:

- [421] I therefore find that Mr. Roussy as the president and director of the other 50% shareholder of SDSI, knew at the outset that SDSI would perform manufacturing projects for TCS and that SDSI would be compensated by a 20% mark-up.
- [422] In addition, throughout the years from 2003 to 2012 Mr. Roussy not only had access to the accounting records of SDSI, but was provided with the year-end financial statements of SDSI. At annual meetings with the company's accountants, the accountants would review the statements in detail, with reference to inter-company transactions. That Mr. Roussy raised no objections until 2012 leads to the conclusion that he consented to the TCS - SDSI business arrangement, at least until that late date.
- [423] In this regard the conversations between the parties from 2003 to 2013 are relevant. As discussed above in the section regarding vulnerability, the parties had numerous and frequent telephone conversations about finances and the work and the customers. I conclude that Mr. Roussy had knowledge throughout that SDSI was performing filler jobs, and that TCS was the customer. Mr. Savage's evidence is accepted in this context: from the outset and the meeting with Mr. Bubnitz, TCS jobs were to be part of the business of SDSI. As such, Mr. Savage did not make formal disclosure to Mr. Roussy, but continued to discuss and refer to the TCS jobs with the understanding that there was no issue with that aspect of the business of SDSI.
- [425] As a result of Mr. Roussy's initial and ongoing knowledge of the TCS work undertaken by SDSI, which he possessed by virtue of the accounting information to which he had access as well as frequent conversations with Mr. Savage, I find that the arrangements were procedurally fair to SDSI.
- [Emphasis added.]
- [125] As such, the judge's conclusion on procedural fairness was premised in large part on Mr. Roussy's knowledge of the TCS Transactions. While it may be no answer to the duty to disclose to say that the directors could have discovered it for themselves (see UPM-Kymmene Corp. at para. 119), the judge's findings of fact went well beyond that. Based on the evidence of Mr. Savage and Mr. Bubnitz, the judge held that Mr. Roussy knew and approved of the arrangement with TCS and the 20% markup. This finding is not directly challenged by Sonic and is owed deference on appeal.
- [126] As to consent, the judge noted the fact "that Mr. Roussy raised no objections until 2012 leads to the conclusion that he consented to the TCS - SDSI business arrangement", at least until that date. While lack of objections may not equal consent in all circumstances, in this particular context, I would find no reason to disturb the judge's conclusion. It must be remembered that the purpose of the filler jobs in the first place was to smooth out irregularities in SDSI's work flow. Both Mr. Roussy and Mr. Savage offered work through their other companies to do so. They agreed that SDSI would perform work for TCS and Mr. Roussy's operating company to address the anticipated and ongoing work flow problem that negatively affected the company's finances. Further, the judge found that Mr. Roussy and

Mr. Savage regularly discussed money and financial issues regarding SDSI throughout its operations from 2003 to 2013 and that he was fully aware of its financial standing. Moreover, the evidence establishes that when Mr. Roussy disagreed with decisions made or proposed by Mr. Savage on financial issues, SDSI did not necessarily follow Mr. Savage's suggested course of action. Contrary to Mr. Savage's proposal, SDSI did not hire a financial controller. And later, Mr. Roussy arranged for SDSI to hire back Mr. Reimer after he was fired by Mr. Savage. In these circumstances, I would find that the judge did not err in effectively inferring continuing consent based on the detailed evidence about the relationship between the parties over the years.

- [127] In GWR Resources, the court noted that the conflicted director in that case obtained quotes from arms-length equipment dealers on an ongoing basis to ensure that the rates he was charging were competitive. While Mr. Savage did not do that, he testified that SDSI charged (and TCS paid) "above-market rates" for the railway projects that TCS formerly had performed by other outside contractors: Reasons at para. 181. The judge referred to that evidence and appears to have accepted it. Indeed, there was no contrary evidence. Significantly, this was not an issue at trial. Sonic did not argue that the 20% markup was below market rates for that work. Rather, Sonic argued, relying on the evidence of Ms. Sidhu, that TCS failed to pay the agreed 20% markup. The judge rejected that argument and appears to have accepted Mr. Savage's evidence that the rates charged were not advantageous to TCS.
- [128] Further, the judge found that Mr. Savage and Mr. Reimer were involved in the internal accounting for the TCS Transactions and that they took active steps to make sure that all of the labour and material costs were accounted for: Reasons at para. 182. Accordingly, as in GWR Resources, on the facts found by the judge it could be said that Mr. Savage did not "pull the wool over anyone's eyes, nor did he attempt to do so": GWR Resources at para. 341; Witzel at para. 103. The allegations in GWR are quite analogous to those in the case at bar:
- [347] GWR argues that the disclosure of the transactions was lacking in procedural fairness and reasonableness because Mr. Reimer and Mr. Shives were only generally aware that EHL was renting equipment to GWR and were unaware of (and unable to obtain) any material details of the transactions, details such as the amount and type of equipment rented, the rental durations, the rent for each item, and that GWR was responsible for repair costs. GWR argues that Mr. Eisler's failure to provide these directors with details of the transactions and his obstruction of their attempts to obtain information prohibited them from any meaningful approval of the transactions. In the absence of any written agreements, copies of invoices or other reasonable method that would enable the directors to know the terms and conditions of the arrangements between GWR and EHL, GWR argues that Mr. Eisler did not "squarely face" the board with the transactions rendering the transactions procedurally unfair and unreasonable in the way they were conducted.

[348] I do not agree. Mr. Reimer and Mr. Shives are both experienced directors and experienced in this industry. As the plaintiffs submit, while they may not have been aware of the granular details of the transactions, they were most certainly aware of the running tally of charges that GWR was incurring with Mr. Eisler's companies on a regular basis. In other words, they were aware, over the course of years, that these transactions were occurring and the costs GWR was bearing. Yet, despite this knowledge, not once did they ask Mr. Eisler to stop providing GWR these services. Not once did they raise any issues in the audit committee meetings (including Mr. Reimer), the annual board meetings (including both Mr. Reimer and Mr. Shives) or any other meetings, formal or not. Instead, the audit committee approved the charges every quarter and the entire board approved the charges at each fiscal year-end. Their consistent approvals allowed GWR to continue using the services of EHL in the same manner every year. The idea that Mr. Eisler should have created a formal written contract for each vehicle and each piece of equipment and called a formal board meeting to vote on each transaction was not required by the board, nor would it be reasonable to require it. No such procedure was followed (or expected) in respect of contracts for services involving other board members.

[Emphasis added.]

[129] I am of the view that similar conclusions can be drawn here based on the judge's findings of fact. Mr. Roussy and Mr. Savage were both experienced directors and very experienced businessmen in the industry in which SDSI was involved. While Mr. Roussy may not have been aware of the granular details of every transaction, the judge found that he was aware that the TCS Transactions were occurring on an ongoing basis and did not once ask Mr. Savage to stop "filling the gaps" with TCS work. The judge set out all of the ways in which Mr. Roussy was informed about the transactions and had access to the details. She also found that Mr. Savage and Mr. Reimer took care to fully record the labour and material charges for the TCS Transactions. In these circumstances and in accord with the informal management structure of SDSI, it was reasonable for the judge to infer that there was no requirement or expectation that Mr. Savage would obtain Mr. Roussy's express approval for every individual transaction.

[130] For these reasons, I would conclude that the judge did not err in finding that the TCS Transactions were procedurally fair and reasonable to SDSI.

Substantive Fairness

[131] Sonic does not seriously challenge the judge's findings on whether the TCS Transactions were substantively fair. It asserts that because of the shortcomings of SDSI's accounting, the judge should have required Mr. Savage to justify the reasonableness of the 20% margin and to establish that the margin was achieved on each transaction. With respect to the first of these assertions, as I have noted above, there was evidence from Mr. Savage to establish the reasonableness of the 20% margin; he indicated that it was more than TCS paid to other suppliers. That evidence was not controversial at trial.

- [132] I would also note that Sonic's case at trial was framed differently than it has been on appeal. At trial, Sonic made the general allegations in its notice of civil claim that I have set out at para. 24 above. These included allegations that TCS used SDSI facilities and personnel to build products that were not properly invoiced or accounted for such that SDSI was not fully remunerated and the profits were misappropriated by Mr. Savage. However, it sought to prove those allegations by relying on the report of Ms. Sidhu. The gist of her report was that TCS earned more than \$3 million in profits that it would not have earned but for the alleged breaches of duty. The judge was very critical of Ms. Sidhu's evidence and rejected it entirely. In doing so, the judge appropriately considered the substantive fairness of the transactions in response to the way in which Sonic approached its claim. She did not have to consider whether TCS paid the 20% markup on each transaction.
- [133] More importantly, the judge accepted Mr. Pallen's evidence that TCS compensated SDSI reasonably for the work done and that SDSI earned in excess of the 20% margin: Reasons at paras. 440, 442. The acceptance of his evidence was decisive given the case presented by Sonic at trial.
- [134] The judge's assessment and acceptance of the expert accounting evidence is owed deference on appeal: *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 at para. 459; see also *Bamrah v. Waterton Precious Metals Bid Corp.*, 2020 BCCA 122 at para. 64. In this case, the judge provided sound reasons for dismissing or according less weight to Sonic's expert and preferring the evidence of Mr. Pallen. Sonic identifies no error in her assessment, palpable and overriding or otherwise, that would justify this Court's intervention on appeal.
- [135] Although not an issue on appeal, the judge also relied on Mr. Pallen's conclusions on compensation for Mr. Savage's children and remuneration for their expenses. She also found that, while Mr. Savage's management could have been improved by hiring a highly trained bookkeeper from the outset, his decisions were reasonable at the time under the deferential business management rule.
- [136] In summary, I would conclude that the judge did not err in finding that the TCS Transactions were procedurally and substantively fair and reasonable to SDSI.

Disposition

- [137] For the foregoing reasons, I would dismiss Sonic's appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Fitch"

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