CITATION: Reed v. Cooper-Gordon Ltd. et al, 2023 ONSC 5261
COURT FILE NO.: CV-20-153-0000
DATE: 2023 09 19

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
ROBERT REED Plaintiff	*M. Zatovkanuk,* for the Plaintiff
- and -	
COOPER-GORDON LTD., DYLAN CHRUS, JAMES COON and THE ESTATE TRUSTEE OF THE ESTATE OF NEIL COOPER Defendants	*C. R. Aiello,* for the Defendants
	HEARD: December 5, 2022, February 6 and 13, 2023 in Guelph, and April 24, 2023 by video-conference

REASONS FOR DECISION

Emery J.

[1] Robert Reed brings this motion for leave to appeal an arbitral decision on questions of law under s. 45 of the *Arbitrations Act, 1991*.

[2] Mr. Reed is a former employee of the defendant Cooper-Gordon Ltd. (“CGL”). He commenced his employment with CGL in 1999. He was also a minority shareholder in CGL through his holding company, Creekside EAP Holdings Inc. (“Creekside”). Creekside was issued 12% of the shares in the company along with other enhancements to Mr. Reed’s employment compensation in 2012.

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[3] Mr. Reed gave notice to CGL in September 2018 of his intention to depart the company as a shareholder. It would appear that this destabilized his continued employment with CGL. His employment effectively came to an end on June 9, 2020.

[4] On May 13, 2020, Mr. Reed commenced this action for unpaid bonuses and CGL’s share of contributions to his RRSP under an employment agreement. He also claimed punitive damages for “shareholder oppression” and unconscionable conduct. The statement of claim was amended to include a claim against CGL to redeem Mr. Reed’s shares, and pay in lieu of notice for 30 months.

[5] As the parties were bound by a shareholder’s agreement, they had agreed to resolve any dispute by arbitration. Mossip J. made an Order dated September 9, 2021 for the parties to litigate Mr. Reed’s issues through arbitration. The Order also appointed Mr. Claude Freemen as arbitrator, and set other terms for that

arbitration. One of those terms provided that the decision of the arbitrator would be final, and wold not be subject to appeal.

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[6] Mr. Freeman released the Arbitration Decision on March 31, 2022. His Costs Decision was subsequently given on July 28, 2022. Mr. Freeman also revisited the issue of the RRSP and bonus claims in the Costs Decision at the request of counsel for Mr. Reed. This request was made as Mr. Reed took the position that there was at the time no decision in regard to the award of RRSP's and bonuses.

[7] Mr. Reed was displeased with the result of the arbitration. He now brings this motion in the action he initially commenced to seek leave to appeal the Arbitration Decision under s. 45(1) of the *Act*. In addition to the motion materials, Mr. Reed uploaded various documents to CaseLines for the court to consider on the leave motion. One of the challenges throughout this motion has been the fallout from an agreement between the parties included as a term in the subsequent Arbitration Agreement that the evidence at the hearing shall not be recorded by court reporter. Consequently, there is no record of evidence given at the arbitration by any witness, and no documents were marked as exhibits.

[8] CGL and its principals (the "CGL parties") oppose the motion. In advance of the hearing date for the leave motion, the CGL parties brought a motion to strike

various documents Mr. Reed had uploaded to CaseLines. The motion to strike would define the documents that will compose the record for the hearing of the motion for leave, and if leave is granted, for the appeal (collectively, the "appeal record").

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[9] When the motion to strike was heard on September 22, 2022, McSweeney J. briefly reviewed the proceedings to date and noted that neither party had put the Arbitration Agreement or the Notice of Appeal in the record. As a result, McSweeney J. found that she was unable to determine what materials should be part of the leave motion, or what the parties agreed would be the record for review purposes. Her Honour therefore dismissed the motion to strike for lacking terms of reference. In its place, McSweeney J. directed counsel to make submissions at the motion for leave to appeal on what materials should be considered for that motion.

[10] I heard the motion to define the appeal record first. Despite the directions given by McSweeney J., the defendants argued this motion as a renewed motion to strike. For oral reasons given on December 5, 2022, the motion was granted, in part, and the appeal record was defined. The motion for leave then proceeded on February 6 and 13, and then on April 24, 2023. This is my decision on that motion.

The issues under appeal

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[11] Mr. Reed seeks leave to appeal the following orders made by the arbitrator:

1. The arbitrator found that Mr. Reed was terminated from his employment rather than resigning voluntarily. However, he only awarded Mr. Reed six months pay in lieu of notice, after mitigation. Mr. Reed was seeking damages for wrongful dismissal based on a notice period of twenty-four months.

2. The arbitrator awarded Mr. Reed unpaid bonuses and the employer's contribution towards his RRSP based on six months notice in each respect for a total of $16,500.72. Mr. Reed claims that the arbitrator failed to consider his claim for unpaid bonuses and RRSP contributions from 2016 to 2019, and a corrected calculation of bonuses and RRSP contributions for 2020;

3. The arbitrator awarded Mr. Reed an amount for the valuation of the shares he held in CGL through Creekside based on 12% of the shares in the company. Mr. Reed takes the position that shares held by Creekside had doubled to 24% with the death of Mr. Cooper in 2019, after which CGL was required to retract Mr. Cooper's shares representing 50% of the company under the Shareholders' Agreement. Those shares were

to be paid for with insurance proceeds CGL received under the key man policy CGL held on his life. The retraction had not yet taken place at the time of the arbitration.

4. Accordingly, Mr. Reed seeks a variation on the fair market value the shares in CGL held by Creekside;
5. The arbitrator dismissed Mr. Reid's claim for punitive damages for "shareholder oppression" as well as for the conduct of any of the defendants;
6. Mr. Reed seeks a variation of the costs award of the arbitrator; and
7. In the alternative, Mr. Reed seeks a new arbitration under s.46 of the *Act* because of the alleged unfairness shown to him by the arbitrator.

The Arbitration Agreement

[12] Mr. Reed and Creekside, defined as the plaintiff, and CGL, Dylan Chrus, James Coon and the Estate Trustee of the Estate of Neil Cooper, defined as the defendants, were the parties to the Arbitration Agreement. The estate of Neil Cooper was named as a party because Mr. Cooper had died on October 20, 2019. He had been diagnosed with cancer in 2017. Mr. Cooper held 50% of the shares in CGL through his holding company, CJM holdings Inc. ("CJM").

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[13] The purpose of this motion, the relevant terms of reference in the Arbitration Agreement include the following:

1. In paragraph 1), the issues for arbitration and the mandate of the arbitrator are set out;

2. in paragraph 3), the provisions of the *Arbitrations Act, 1991* apply to the arbitration except where a provision of the Arbitration Agreement provide otherwise;

3. in paragraph 9), the arbitrator shall apply the laws of evidence to the arbitration as if the hearing was a trial in the (Ontario) Superior Court of Justice, including the provisions of rule 53, subject to the provision that the parties will have previously exchanged document briefs/affidavits in accordance with the procedure set out in paragraph 6);

4. in paragraph 11), the evidence at the arbitration hearing shall not be recorded nor transcribed by court reporter; and

5. in paragraph 14), the parties agreed that the decision of the arbitrator is final and binding upon them and no appeal to a court is allowed unless otherwise permitted under the *Arbitrations Act, 1991*.

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[14] After the Arbitration Agreement was entered, the parties reached Partial Minutes of Settlement executed by the defendants on November 22, 2021 and by the plaintiff on November 25, 2021. The recitals to the Partial Minutes of Settlement acknowledged that the plaintiff currently owns a 12% interest in CGL. The Partial Minutes of Settlement also contain a recital that all parties want the shares held by the plaintiff to be retracted by CGL.

[15] One of the issues to be determined by the arbitration was the date to be used as the valuation date for the value of the company strictly for the purpose of assessing the value of Mr. Reed's shares. Of the three dates (September 2018, June 2020 and January 2022) under consideration as the valuation date, and having regard to August 31 as the fiscal year-end of CGL, the Partial Minutes of Settlement mandated the arbitrator to use August 31, 2020 as the valuation date.

Establishing the motion record

[16] On reviewing the evidence on both motions before me on December 5, 2022, I made the Order, partly on the evidentiary record put forward by the parties, and partly using my inherent jurisdiction, to identify the following record for the leave motion:

1. The pleadings filed in the Superior Court of Justice that led to, and defined the issues for arbitration;

2. The Order made by Justice Mossip on September 9, 2021;

3. The Arbitration Agreement signed by the parties between September 22 and November 16, 2021;

4. The arbitral decision of Arbitrator Claude Freeman dated March 31, 2022.

5. Mr. Freeman's Order as to costs dated July 28, 2022;

6. The endorsement made by Emery J. dated May 9, 2022;

7. The shareholders' agreement for the shareholders or their proxies in Cooper-Gordon Limited;

8. The Partial Minutes of Settlement dated November 22 and 25, 2021; and

9. Any documents relating to the back pay Robert Reed was owed for RRSP's and bonuses on or from May 2017 to the date his employment was terminated.

[17] With the appeal record defined for the benefit of the parties, I adjourned the leave motion to February 6 and 13, 2023 and again to April 24, 2023 to complete hearing the motion.

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Analysis

Statutory framework

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[18] Section 45(1) of the *Arbitrations Act, 1991* provides a litigant with an avenue of appeal to the court from an arbitral award in limited circumstances. It reads as follows:

> 45 (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties. 1991, c. 17, s. 45 (1).

[19] The leave to appeal provisions of section 45(1) apply where the agreement to arbitrate does not deal with appeals on questions of law. It therefore allows a party to appeal an arbitral award on a question of law based on the statute itself. Section 45(1) further states that leave shall be granted only if the court is satisfied that the matters at stake are of such importance to the parties to justify an appeal, and that the determination of the question of law will significantly affect the rights of the parties.

[20] It is not enough that the proposed appeal raise a question of law. The legislature, recognizing the utlility of the arbitration process, has restricted the right

to appeal on a question of law to those cases containing the importance factor and the significance of the question of law on the rights of the parties as the gateway to appeal, with the judge as the gatekeeper.

[21] The parties do not dispute that the onus of meeting the elements under s. 45(1) rests squarely on Mr. Reed as the party seeking leave to appeal.

Governing principles

[22] At the outset of the motion to strike, the preliminary decision of Chief Justice Joyal of the Manitoba Court of Queen's Bench in *Christie Building Holding Co. v. Shelter Canadian Properties Ltd.*, at 2021 M.J. 101 provided guidance to this court for the identification of documents to include in the record for the motion for leave. By the time the leave motion was argued, the decision of Chief Justice Joyal on that case at 2022 MBKB 239 had been released. This latter decision contains a comprehensive review of many principles at work on the motion.

[23] The agreement of parties to submit to arbitration or the applicability of statutory appeals of arbitral awards on questions of law give rise to key principles having a bearing on the jurisdiction of the court for the appellate review. These principles were considered in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32. In *Teal Cedar*, the Supreme Court held that statutory limitations on the scope of appellate review of those decisions is absolute. This principle derives

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from *Sattva Capital Corporation v. Creston Moly Corp.*, 2014 SCC 53. Both of these decisions from the Supreme Court involved decisions made in commercial arbitrations. Chief Justice Joyal in *Christie*, drawing the distinction between questions of law (at the leave stage), and errors of law (at the appeal stage), also spoke to the requirement that an arbitrator's decision must a legal question of sufficient arguable merit to confer jurisdiction on the court to review an award in those circumstances.

[24] The Court in *Teal Cedar* set out the classic test for characterizing the three types of questions for appellate purposes at para. 43:

> [43] The process for characterizing a question as one of three principal types — legal, factual, or mixed — is also well-established in the jurisprudence (*Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 35). In particular, it is not disputed that legal questions are questions "about what the correct legal test is" (*Sattva*, at para. 49, quoting *Southam*, at para. 35); factual questions are questions "about what actually took place between the parties" (*Southam*, at para. 35; *Sattva*, at para. 58); and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts" (*Southam*, at para. 35; *Sattva*, at para. 49, quoting *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[25] Since the first motion was heard to establish the appeal record, the Court of Appeal released the decision in *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 861, which reversed the decision on the application at 2019 ONSC 6597. The appellate decision is instructive on identifying a question of law, how or when an extricable question of law is derived from a question of mixed fact and

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law, and the scope for relying on procedural fairness to set aside an arbitral decision. Harvison-Young J.A. warned in *Tall Ships* at para. 16 that:

> [16] The principle that in exercising their role as appellate courts, judges should not be too ready to characterize particular issues as issues of law because doing so may render the point of consensual arbitration nugatory is of particular importance when, as here, the impugned terms form a relatively small part of a large and complex arbitration decision. As the Supreme Court has stated, "the circumstances in which a question of law can be extricated from the interpretation process will be rare": *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 113, citing *Sattva*, at para. 55.

[26] An overarching principle that emanates from the authorities is that the scope of appellate review where an arbitral award is restricted to questions of law will be enforced for finality purposes. The authorities also have established the foundational principle that parties shall be kept to their bargain when they agree to resolve their differences through arbitration: See *Tall Ships*.

[27] These principles define my role as the gatekeeper is to accept or deny any issue that meets the requirements of raising a question of law having sufficient importance and significance to the parties to justify an appeal. This role is consistent with s. 6 of the *Act,* which unequivocally limits the intervention of the Court to expressly stated purposes. This rle is also aligned with the definitive language of the Supreme Court to find the necessary jurisdiction to exercise those powers: *Teal Cedar*, at paras. 41 and 42.

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Determination of issues for leave

[28] The parties agree that my determination of the issues that raise a sufficient question of law is not an all or nothing proposition, but is properly decided on issue by issue. I am therefore proceeding on that basis.

1. *Notice period for wrongful dismissal*

[29] Mr. Reed submits that Mr. Freeman erred in law by not applying the principles in *Bardal v. Gobe & Mail Ltd.*, 1960 CanLII 294 to determine the notice period for which he was entitled to receive pay in lieu of notice. Any award of damages is subject to the plaintiff's duty to mitigate which would have the effect of reducing those damages. See *Red Deer College v. Michaels*, 1975 CanLII15 (SCC).

[30] There is no dispute that Mr. Reed was under a positive duty to mitigate his damages for termination from employment by finding similar employment. Mr. Freeman found as a fact that Mr. Reed was terminated by CGL on June 9, 2020, and that he was earning $84,000 a year, or $7,000 per month at the time of his termination. Mr. Freeman went on to find that Mr. Reed acquired alternate employment on January 8, 2021 with a base annual salary of $85,000, which he

calculated to have occurred six months after his departure from CGL. Mr. Freeman therefore awarded six months pay in lieu of notice to Mr. Reed on this claim.

[31] In my view, the route taken by Mr. Freeman to arrive at the same place of awarding six months pay for wrongful dismissal does not raise a question of law. In matters of appeal with respect to questions of law, the court is to apply reasonableness, or whether it is reasonable for the trier of fact to have reach his conclusion upon the application of proper principles, as the standard of review: *Teal Cedar*, at para. 74.

[32] The arbitrator reached a reasonable conclusion based on the evidence. Whether he started his measurement of damages at June 9, 2021 and ended when Mr. Reed obtained new employment at a comparable salary, or he projected out a greater notice period but doubled back to account for the amount earned from that new employment, all roads lead to the same result: Mr. Reed was awarded pay for the months between employers.

[33] It should go without saying that it is the Order from which an appeal may be taken, not the reasons for arriving at the Order made. It follows that the same consideration applies on a motion for leave to appeal.

[34] I would only permit leave to appeal to allow the appellate court to correct the mathematical error of Mr. Freeman's statement that the notice period was six

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months. It appears he did not count the seven months between Mr. Reed's start date and end date to calculate his damages for notice. To allow this error to persist would be unreasonable. A misapplication of a legal test can give rise to an implicit error on a question of law: *Teal Cedar*, at para. 44. The difference of a month of pay could be significant to the parties, and is of sufficient importance to justify an appeal on the point.

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2. Entitlement to unpaid RRSP and bonus payments

[35] Mr. Freeman based his award of bonus payments and RRSP contributions from CGL as Mr. Reed's employer on the same six months of notice entitlement. While he did not make this clear in the main arbitration decision, he was very clear on the measure of these damages on pages 2 and 3 of the Costs Decision as being "symmetrical with the 6 month wrongful dismissal award in the decision."

[36] It would appear from the appeal record and Mr. Freeman's decisions that he did not decide the claim made by Mr. Reed for unpaid bonuses and RRSP contributions for the years 2016, 2017, 2018 or 2019. These claims were pleaded in the Amended Statement of Claim that was before Mr. Freemen and forms part of the appeal record.

[37] The defendants submit that most if not all these claims are subject to a limitation period defence. They also claim that the bonuses, if not the RRSP

contributions were discretionary and that some were not paid out to other employees such as Mr. Coon or Mr. Cooper. I do not have a sufficient record to make any ruling on whether defences of either nature make Mr. Reed's claims in this respect untenable.

[38] It was held in *Van Decker Estate v. Van Decker*, 2022 ONCA 712 that a court should not interfere where the reasonableness of a decision made by judge (or other trier of fact) who has not given formal reasons for a decision denying certain relief can be discerned from the record. Here, there is no record before the court on what evidence Mr. Freeman heard at the arbitration and he gave no reasons why he did not deal with these claims at all – despite being asked to address them again in the Costs Decision.

[39] In my view, this ommission raises a question of law. The modern basis to consider the absence or insufficiency of reasons for a ruling or verdict as an error of law is found in *R. v. Sheppard*, 2002 SCC 26. In *R. v. R.E.M.,* 2008 SCC 51, the Supreme Court explained that reasons given by a court in Canada must enable the courts to perform the functions that reasons are expected to serve. This includes the sufficiency of reasons to explain the basis for the decision made, and to allow for meaningful appellate review. At that level, deficiencies of reasons can amount to an error of law: *R. v. J.C., 2023 ONCA 101*, at paras. 4 and 5.

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[40] I have little difficulty with finding on the record that this matter is of considerable importance to the parties. After all, it was the wedge issue that drove the parties apart in 2018 and motivated Mr. Reed to commence the action against CGL. There is little in the arbitral decision to assess how the determination of how this issue will affect the interests of the parties. However, judging from the positions taken by each party on the matter, it is something of significance to each of them. I therefore conclude this question of law will significantly affect the rights of the parties to justify granting leave to appeal for this issue.

3. Valuation of Mr. Reed's shares in Cooper-Gordon Limited

[41] This valuation issue is combined with the claim of Mr. Reed that he held 24% of the shares in CGL to be assessed for retraction by the company in the arbitration.

[42] Mr. Reed claims that his 12% shareholding doubled when Mr. Cooper's shares through CJM were subject to retraction after his death, funded by the proceeds of a key man policy. As I understand Mr. Reed's submissions, Mr. Cooper's shares represented 50% of all issues and outstanding shares in CGL. The retraction of those shares under the Shareholders' Agreement would have doubled the number of shares he held on Mr. Coopers death.

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[43] Mr. Freeman concluded in the arbitral decision that Mr. Reed was only entitled to received an amount for his shares representing 12% of the company, valued at August 31, 2021. This valuation date was fixed by the Partial Minutes of Settlement and is not in dispute. The greatest issue in the valuation of shares is the question of whether Mr. Reeds shares ought to have been assessed based on 12% or 24% of the company's value.

[44] I do not see how the court can conclude anything other than that Mr. Reed held no more than 12% of the shares in CGL at any time. I make the following three observations to references made by Mr. Reed (and on behalf of Creekside) in documents that were before Mr. Freeman.

1. He held those shares in proportion to all others according to the third "whereas" clause and Schedule A to the Shareholder Agreement. Schedule C of the Shareholders' Agreement provided that the value of CGL would not be determined in regards to the death of a principal (defined in subpara. bb) as meaning Cooper, Coon, Chrus or Reed) or to any insurance proceeds received by the corporation on the life of a deceased principal.

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2. Mr. Reed, and later Creekside later claim a right to have their 12% of the shares in CGL purchased by the corporation. This claim is made in their own amended statement of claim.

3. Third, the first of ten recitals to the Partial Minutes of Settlement states that Mr. Reed owns and controls Creekside, which in turn "currently owns a 12% interest in Cooper-Gordon Limited, which was defined as "Reed's shares"). The parties agreed in para. 1 of those Minutes that the above recitals are true in substance and in fact. Mr. Reed signed those Partial Minutes of Settlerment on November 25, 2021, more than two years after Mr. Cooper passed away.

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[45] It is clear to me that the findings made by Mr. Freeman on this issue involve findings of what happened and when, which are finding of fact. If I am incorrect on drawing that conclusion, I find that any dispute about his interpretation of the Shareholders' Agreement would raise questions of mixed fact and law. Matters of contract are inherently fact specific and more often than not are questions of mixed fact and law. *Sattva*, at paras. 54-55.

[46] It would be difficult, if not impossible to extricate a relevant legal question from the factual matrix in this case. As the Court stated in *Housen v. Nikolaisen, 2002 SCC 33* at para. 36, "Where the legal principle is not readily extricable, then

the matter is one of mixed law and fact". The reason it would be difficult to extricate the legal question from the factual findings of the trier of fact arises from the law of surrounding circumstances discussed in *Sattva.* Applied to this case*,* principles of contractual interpretation would depend on the contracting intentions of parties at the time the Shareholders' Agreement was formed, where one of the principals, Neil Cooper, is no longer living.

[47] Instead, the corporation and the other shareholders' were left to explore their rights under the Sharholders' Agreement as it reads. These rights included not only Mr. Reeds's rights, but the rights of CJM that continued to hold the shares of Mr. Cooper. All of these rights operated against a factual backdrop, and involved questions of mixed fact and law. This issue involves questions of mixed fact and law that the parties removed from any right of appeal by their own agreement. See *Tall Ships* at para. 49 and 72.

4. Oppression remedy or punitive damages

[48] Mr. Reed was seeking punitive damages or compensation at the arbitration for an oppression remedy based on the defendants' conduct during the litigation. In my view, he is not entitled to appeal Mr. Freeman's decision dismissing either claim.

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[49] The concepts of punitive damages and oppression remedies are not interchangeable, and serve different purposes at law.

[50] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, Binnie J. explained that an award of punitive damages in a contract case is rare. It requires an actionable wrong in addition to the basis for the breach of contract. Often a claim of bad faith, if made out, qualifies as an independent wrong committed by a contracting party. This was the legal basis for the Court in upholding the jury verdict by finding that that an insurer breached its duty of good faith owed to the policyholder in *Whiten*.

[51] Punitive damages are only imposed where the conduct of the wrongdoer has been high-handed, malicious or reprehensible conduct that stands as a marked departure from ordinary standards. Where awarded, punitive damages should be assessed in proportion to factors such as the harm done, the degree of misconduct and vulnerability of the plaintiff, and only where the misconuct is likely to go unpunished.

[52] The purpose of punitive damages is not to compensate the plaintiff for an injury of some description, but to give that plaintiff some measure of retribution and to deter the defendant or any other party from similar behavior. They are awarded only in those circumstances where compensatory damages are insufficient to accomplish their intended purposes. None of those circumstances are found in

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the record on this motion, to either raise a question of law, or to justify leave as a matter of some importance.

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[53] The oppression remedy, on the other hand, is a statutory claim under s. 248 of the (Ontario) *Business Corporations Act*. It has long been held that damages a court may award for unfair or other wrongful conduct by a majority of shareholders to a minority shareholder is compensatory in nature. These damages are quite the opposite of the purpose for which punitive damages are intended to serve. A right to relief under the *OBCA* because of the wrongful conduct of the corporation or its managment based on the "reasonable expectations" of the claimant as a shareholder must be made out, along with causation and the basis for compensable injury: Re: *BCE Inc.,* 2008 SCC 69, at para. 90. See also *Naneff v. Concrete Holdings Limited*, 1995 CanLII 959.

[54] There is no evidence in the appeal record to refute the findings of Mr. Freeman that there was nothing before him that appeared to be, or was clearly on the surface, egregious behavior or conduct. This was a finding of fact that this court has no jurisdiction to disturb. I therefore conclude that there is no question of law on which to assess the importance of the question or whether the determination of it would significantly affect the rights of the parties.

5. Failure to treat each party fairly

[55] Mr. Reed included a claim for relief under s. 46 in his Notice of Motion to obtain a re-hearing of the arbitration in the event it is found on appeal that Mr. Freeman did not treat each party fairly. The only basis for making this argument in the motion materials was an allegation that Mr. Freeman did not ask any questions during the hearing. Some counsel trying a commercial case before a tribunal would consider that to be a good sign.

[56] In view of my findings under s. 45(1), it is not necessary to address this part of the motion for leave. However, I do not consider any part of the decision with respect to Mr. Freeman's approach to the arbitration or its process before him to suggest he did not treat the parties fairly to support a new hearing under s. 46. I would also add the instructive words of Harvison-Young J.A. in *Tall Ships*, where she stated emphatically that s. 46 cannot be used as a broad appeal route to "bootstrap" substantive arguments used to attack an arbitrator's findings.

Conclusion

[57] Leave to appeal granted, limited to the one month difference in the notice period for the wrongful dismissal claim, and with respect to whether Mr. Freeman addressed Mr. Reed's claim for unpaid RRSP and bonus payments. The balance of the motion is dismissed.

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[58] The parties are encouraged to resolve costs of the motion before McSweeney J. on September 27, 2022 and those motions heard by me. If either party seeks costs for any of those motions, that party shall file written submissions by September 29, 2023, with the responding submissions due by October 9, 2023. No reply submissions are permitted. Any written submission is limited to three, double spaced pages, not including any bill of costs or offer to settle. Written submissions may be filed by email to my judicial assistant at Melanie.Powers@ontario.ca.

[59] If no written submissions are received by September 29, 2023, the parties shall be deemed to have resolved costs between them.

Emery J.

Released: September 19, 2023

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B E T W E E N:

ROBERT REED

Plaintiff

- and -

COOPER-GORDON LTD., DYLAN CHRUS, JAMES COON and THE ESTATE TRUSTEE OF THE ESTATE OF NEIL COOPER

Defendants

REASONS FOR DECISION

Emery J.

Released: September 19, 2023