IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Renpenning v. Renpenning,* 2023 BCSC 789

Date: 20230511
Docket: S00323
Registry: Abbotsford

Between:

Darwin Renpenning also known as Darwin John Renpenning and Denise Eliesabeth Renpenning

Plaintiffs

And

Lillian Rose Renpenning also known as Lillian R. Renpenning

Defendant

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Plaintiffs:	B. Lorimor
Counsel for Defendant:	D. MacAdams, K.C.
Place and Dates of Trial:	Port Coquitlam, B.C. February 21–24, 2023
Place and Date of Judgment:	Port Coquitlam, B.C. May 11, 2023

Table of Contents

I. Introduction

[1] In this trial, the plaintiffs are two minority shareholders of 3D Cycles Ltd. ("3D Cycles" or the "Company"), a corporation incorporated under British Columbia's *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]. The plaintiffs seek an oppression remedy against the defendant, the majority shareholder and director of the Company, for treatment they say is oppressive, unfair and unjust.

[2] Context is important when assessing claims of shareholder oppression. In this regard, the circumstances of this case involve more than simply a corporate dispute between minority and majority shareholders. The minority shareholding plaintiffs, Darwin Renpenning and his sister, Denise Renpenning, are the children of the defendant and majority shareholder, Lillian Renpenning. Since at least 2017, there has been a litigious and acrimonious relationship between the parties. Given that the parties share the same surname, I may refer to them by their first names. I do so meaning no disrespect.

[3] In this trial, the issue is whether the defendant's decisions made as the Company was being shut down in her capacities as both the director and majority shareholder were oppressive or unfairly prejudicial to the plaintiffs. Specifically, the plaintiffs say they had a reasonably held expectation that the defendant would treat the plaintiffs fairly when directing how 3D Cycles' money would be spent, including that the defendant would not pay herself excessive amounts as a retirement allowance, salary and retroactive salary. The plaintiffs also assert that the defendant abused her authority as the majority shareholder and breached the plaintiffs' reasonable expectations in an oppressive manner by directing that the defendant's legal fees to defend this action be paid out of the Company's money.

[4] For the reasons that follow, I find that the defendant paying herself an excessive salary in 2019, and directing that the Company pay her legal fees in respect of this action, warrant court intervention to protect the shareholder rights of

the plaintiffs. However, I conclude that the other actions taken by the defendant do not give rise to an oppression remedy.

[5] In essence, the defendant operated the Company for five decades with little or no input on decision-making from the plaintiffs. The plaintiffs expected and accepted this decision-making process, and the results of the defendant's decisions for the Company. However, underlying the plaintiffs' acceptance was a reasonable belief that the defendant would treat the plaintiffs fairly. Save for the excessive remuneration the defendant paid herself in 2019, and her direction that she be indemnified for the legal fees for this action, I find that her conduct did not breach a reasonable expectation of the plaintiffs in a manner that was unfairly prejudicial or oppressive towards them.

II. Background Facts

[6] I will provide my findings of fact in more detail when addressing the issues in this case. However, for context, I will first provide some background facts regarding the history and operation of 3D Cycles, as well as a description of the relationships of the parties with each other and to the Company.

A. 3D Cycles

[7] 3D Cycles was incorporated on January 13, 1971, and operated until the defendant began shutting down the business in 2019 and 2020. The Company operated in Abbotsford, British Columbia selling and servicing motorcycles, as well as selling motorcycle parts and accessories such as jackets, helmets, and gloves. 3D Cycles was started by David Renpenning Sr. ("David Sr.") and his wife, the defendant, to earn income for themselves and their children. As I will discuss, David Sr. and the defendant hoped that the business would pass down through their children and remain a family business. Indeed, the "3D" portion of the 3D Cycles name honoured the three children of David Sr. and the defendant: David Renpenning Jr. ("David Jr."), Darwin, and Denise.

[8] At the incorporation of 3D Cycles, David Sr. owned two shares and the defendant owned one share. They were the only officers and directors of the Company.

[9] In February 1975, 3D Cycles was operating a Honda franchise out of 2448 Clearbrook Avenue in Abbotsford (the "2448 Clearbrook Property"). The defendant testified that she saw a notice in a newspaper advertising the opportunity for a Honda dealership franchise. She persuaded David Sr. to apply and, upon a successful interview process with Honda executives, 3D Cycles was granted the franchise.

[10] On December 16, 1980, 3D Cycles became the registered owner of 2121 Clearbrook Avenue in Abbotsford (the "2121 Clearbrook Property"), after selling the 2448 Clearbrook Property.

[11] In September 1981, David Sr. and the defendant directed that the shareholding of the Company be restructured. The result was that David Sr. held 110 shares; the defendant held 100 shares; and their son David Jr. held 30 shares. The defendant also held 30 shares in trust for Darwin and 30 shares in trust for Denise. David Sr. and the defendant remained the only officers and directors of 3D Cycles.

[12] As I will discuss in more detail below, the parties appear to agree that 3D Cycles was operated in order to provide income for the defendant and David Sr., and also to provide future income and economic stability for their children. I accept that the hope and expectation of the defendant and David Sr. in establishing 3D Cycles was that the business would thrive and that it would be passed on to the defendant and David Sr.'s children.

[13] Sadly, on January 3, 1987, David Jr. died in an automobile accident. In my view, David Jr.'s death unsurprisingly had a profound emotional impact on the Renpenning family. It also impacted the dynamics between the family members and the operation of 3D Cycles. The defendant testified that when David Jr. died, all of

the plans for the future “went out the window”. The defendant testified that David Jr. was following in David Sr.’s footsteps as a mechanic. As I understood the evidence, David Jr. and Darwin worked together at the Company. Darwin was more skilled as a sales person for motorcycles, parts, and accessories, and David Jr. was more skilled as a mechanic. As such, David Jr.’s death, as well as being emotionally devastating for the parties, also disrupted plans for the future operation of 3D Cycles.

[14] In 2010, 3D Cycles lost the opportunity to operate the Honda franchise. This caused the Company significant hardship. The defendant testified that in order to keep the Honda franchise, 3D Cycles would have had to construct a corporate retail space to Honda’s specifications, which would have cost $5 million. Losing the Honda franchise forced 3D Cycles to change its business model to import motorcycles from the United States to sell in British Columbia. There was consensus at trial that Darwin was instrumental in importing product from the United States. At that time, the favourable exchange rate between the Canadian and United States dollar made it economically viable for the Company to import motorcycles from the United States to Canada for sale. While Darwin’s efforts to import motorcycles assisted the Company to keep going, it lost money in the 2014 and 2015 fiscal years. The defendant testified that because property taxes had increased and the Company was facing lower revenues and losses, she and David Sr. decided they should sell the 2121 Clearbrook Property to get a more affordable location from which to operate the business.

[15] On November 27, 2015, 3D Cycles purchased commercial strata lots at 31272 Peardonville Road, Abbotsford (the “Peardonville Property”). The Company sold the 2121 Clearbrook Property on January 25, 2016. Although it was smaller than the 2121 Clearbrook Property, 3D Cycles continued the business of servicing motorcycles, and selling motorcycle accessories and new and used motorcycles, from the Peardonville Property.

[16] David Sr. died on September 24, 2017. Again, understandably, this caused both unrest for the Company and emotional strain for the family.

[17] 3D Cycles is currently divided into 300 shares, owned as follows: the defendant owns 190 shares (63.33%), Darwin owns 80 shares (26.67%), and Denise owns 30 shares (10%). The defendant is the sole director and the Chief Executive Officer.

[18] As will be discussed below, 3D Cycles started shutting down its operations in 2019. In particular, in 2019 and 2020 the Company began selling its inventory, primarily to 3-D Cycles (2019), a company incorporated by the defendant's grandson, Byron Williamson. In January, 2020, the Company sold the Peardonville Property. This resulted in proceeds to 3D Cycles of $1,219,196.48. In light of the additional retained earnings arising from the sale of the Peardonville Property, the defendant passed a number of resolutions, which are the subject matter of this litigation. The defendant's resolutions included directing that the Company pay certain amounts to her for retroactive salary, retirement allowance and to repay her shareholder loan account. Any amount remaining as retained earnings of the Company after other expenses were paid was to be distributed to the shareholders in proportion to their shareholdings.

[19] The defendant retained MNP, an accounting firm, to assist with the distribution of the remaining funds. On July 6, 2020, MNP sent a proposal to the shareholders regarding the distribution of the Company's remaining funds. On December 24, 2020, a follow up letter was sent to the shareholders from the Company's law firm, Taylor, Tait, Ruley & Company, requesting that Darwin and Denise accept payment of a dividend for their share of the remaining assets of the Company, valued at $324,648. Darwin's 26.67% share of this amount was $86,573. Denise's 10% share was $32,465. The letter also set out the reconciliation of the Company's cash balance, which included the various accounts payable for the Company at the end of 2020, including the retroactive pay and retirement allowance paid to the defendant. The plaintiffs did not agree with the manner in which the

Company's assets had been spent or to the proposed dividend amounts. As a result, in February 2021 the plaintiffs commenced this litigation.

B. Lillian Renpenning

[20] The defendant is currently 81 years old. She worked in some capacity at 3D Cycles for almost 50 years. From her evidence and the evidence of Darwin and Denise, I accept that the defendant was involved in the day-to-day operations of the business and had a licence to sell motorcycles. She also appears to be the primary individual to maintain the accounting for 3D Cycles. As I understand the evidence, the defendant did not always work regular hours at the premises, especially as her years progressed. However, she maintained control of all business decisions for the Company in terms of strategic planning and operations, as well as keeping some involvement in the sale of motorcycles, parts, and accessories.

[21] From the defendant's testimony, I accept that the objective of the defendant and David Sr. for starting the Company (and later making their children shareholders of the Company) was, in the words of the defendant, to "look after our children" and on the hope that "our children could have better than what we had".

C. Darwin Renpenning

[22] Darwin Renpenning is currently 60 years old and drives a transit bus. He worked for 3D Cycles in various capacities, starting when he was a teenager in the 1980s until June 30, 2017. However, his employment with the Company was marked by some instability. On several occasions he quit over disputes with the defendant without providing any notice.

[23] The first time Darwin left the Company was in 1994. He quit over a dispute with the defendant regarding a motorcycle sale. He rejoined the Company for a period of approximately four months in 1997.

[24] Darwin then got married and moved to the United States in 1997, where he lived for a time, in Texas and Colorado. His marriage broke down and he returned to

Canada in 2002 with his two sons. Darwin required money to pay for his divorce and requested money from his parents. At the time his parents did not have sufficient funds to personally loan Darwin money and loans were made to Darwin from 3D Cycles to assist with his divorce proceedings. Darwin entered into four promissory notes with 3D Cycles between August 13, 2001 and May 6, 2002 for the total amount of $29,000, plus interest (the "Promissory Notes") in relation to the loan. Darwin has not repaid the amounts owing to 3D Cycles from the Promissory Notes. He testified that he did not have the funds to pay the money back. I accept from his testimony that Darwin did not expect to repay the amounts owing on the Promissory Notes when he borrowed the money. He also testified that he believed his mother knew he would never be able to repay the notes.

[25] In late 2002, Darwin again abruptly stopped working at 3D Cycles because, according to his evidence, his mother did not allow him to take his then-girlfriend for a ride on one of the shop-floor display motorcycles. The defendant testified that she refused to allow Darwin to use the motorcycle because having the motorcycle out of the shop would result in an unnecessary expense. Darwin testified that his mother did not allow him to use the motorcycle because she did not approve of his girlfriend. In any event, Darwin stopped working at 3D Cycles, for approximately a year, which put an additional burden on the defendant and the Company. In particular, the defendant testified that Darwin's sudden departure meant that she was left without a sales person and a parts person. She had to shoulder the additional burden in Darwin's absence.

[26] Darwin returned to work at the Company in late 2003 where he remained employed until June 30, 2017. As set out above, in 2010, 3D Cycles lost the rights to be a Honda franchise. Darwin began importing motorcycles from the United States to sell through 3D Cycles. To reiterate my earlier findings, I understand the import venture was viable at that time because the Canadian dollar was stronger than the American dollar, making importation and resale for a profit possible. Darwin testified that he worked very hard during this period of time to keep 3D Cycles operating. From his evidence, it was clear that he believes that without his efforts 3D Cycles

would not have survived after losing the Honda franchise. I accept that during those years, Darwin made a more significant contribution to 3D Cycles both in time and value than he did during his other years at the Company. I also note that despite his efforts, 3D Cycles was not profitable during those years.

[27] In summary, I find that in relation to his employment at the Company, Darwin worked primarily selling motorcycles, parts, and accessories. He was not involved in the repair aspect of the business in any significant way. He has had a lifetime passion for motorcycles, and I accept that he is highly knowledgeable about the sale of motorcycles, and their parts and accessories. Darwin testified that he did not do any of the "book work" for the Company. I take this to mean he did not do any of the accounting or financial tasks relating to operating the business, other than writing cheques for products, which I would characterize as a form of transactional operation.

[28] Apart from his employment at 3D Cycles, in 1981 Darwin was also gifted 30 shares in the Company by his parents, held in trust at that time. In 1984, he received an additional 50 shares. Darwin transferred the shares back to his father on December 18, 1999, because Darwin did not want them to form part of his property during the divorce proceedings. On February 10, 2005, 80 shares were transferred back to him. As discussed above, this is the number of shares that he currently owns.

[29] Darwin acted as a director of 3D Cycles from February 10, 2005, to February 7, 2018. However, I accept that he was not involved in decision-making at the Company, and expected and accepted that his father and mother would make the decisions for the business. Darwin was never an officer of 3D Cycles. At trial, Darwin confirmed his testimony during his examination for discovery that he was never asked for his input or contribution on any management decisions relating to 3D Cycles.

[30] As well, Darwin did not participate in any significant way at shareholder meetings at any time during the history of 3D Cycles. He was not involved in setting the salaries of employees or any of the major strategic decisions of the Company. As a shareholder, he signed the resolutions and was passive, deferring to the decisions made by his mother and father as directors and majority shareholders of the Company.

[31] I therefore accept as fact that Darwin was in effect only an employee of 3D Cycles who, although interested in the business and clearly passionate about motorcycles, did not take part in any strategic planning at the Company. He was content to be a paid employee. In direct examination, Darwin testified that in respect of the financial statements of 3D Cycles circulated at the Annual General Meetings ("AGMs"), he "glanced over financials and signed what I was told to sign".

[32] Darwin did not invest any of his own money into the Company. He accepted on cross-examination that he did not have "any skin in the game", and was not willing to do so. From this statement, I accept that Darwin was not willing to invest his own money into the Company. Moreover, I place some weight on Darwin's history of quitting without notice. While he was entitled to terminate his employment, I find that it demonstrates he was willing to put his personal needs above those of the Company. Each time he left 3D Cycles, his departure clearly affected the Company's business negatively.

[33] Finally, I note there is a prior history of litigation arising from Darwin's relationship to the Company and the defendant. In 2016, the Company issued dividends to the shareholders. The defendant and David Sr. decided that the dividends due to Darwin should be paid as a promissory note, as opposed to cash. The defendant testified that this decision was made on the view that if Darwin were to keep working with the Company at its new location, he should have some of his own money tied to the Company's success. Darwin took offence to being treated differently than the other shareholders. In response, he filed a claim for an oppression remedy in January 2018. I will discuss the results of that claim in more

detail below but, in essence, Darwin was successful in his pursuit of the oppression remedy and received an amount of $199,114 in dividends, as well as six months of wages, totalling $26,800.

D. Denise Renpenning

[34] Denise is the youngest child of the defendant and David Sr. She is currently 58 years old and lives in Mexico. Denise had less involvement in 3D Cycles than did the other members of her family. Denise testified that when she was a young adult, her role in the business was to “look after the household” and clean the house. I took from her evidence that Denise was less involved in the actual operations of the motorcycle business when she was a youth and young adult. I accept Denise’s evidence that she had minimal involvement in the Company. In approximately 2007, Denise assisted the Company (and, specifically, the defendant) by setting up QuickBooks accounting software. Denise also participated by helping at the shop if needed, when she was not living in a different city.

[35] Denise was gifted her 30 shares in the Company in 1981, held in trust at the time as she was still a minor. They were put in her name in 1984. Denise testified that her father told her that she was given the shares so the business could “carry on into the future”.

[36] Denise was residing in Kelowna when David Sr. passed away in 2017. However, she made trips from Kelowna to Abbotsford to be with her father while he was unwell before he died. Denise testified that after David Sr. died, her relationship with the defendant “soured” because, according to Denise, the defendant was unaware that Denise and David Sr. had a joint bank account, and this information hurt the defendant.

[37] Sometime after David Sr. died, in June 2017, Denise became aware that the Company had issued her dividends in the amount of $12,000 in relation to the sale of the 2121 Clearbrook Property. However, Denise did not receive a payment of the dividends. She only became aware of the issuance because she was assessed tax

and penalties by the Canada Revenue Agency ("CRA") on the dividends. In 2018, Denise started a Small Claims Court action against her mother to get the payment of the $12,000 in dividends, and for associated damages. Denise was successful in the Small Claims action and garnished the defendant's wages.

[38] Denise never acted as a director of the Company and was not involved in any of the strategic decisions of 3D Cycles. She did not participate in any meaningful way in the decisions of the business. She testified that she attended one AGM that she believes occurred in 2010. She did not invest any money in the Company and acknowledged in cross-examination, like Darwin, that she had "no skin in the game". She was not involved in setting any of the remuneration for employees nor the amount of retained earnings to be allocated as dividends.

[39] In cross-examination, Denise acknowledged that no one had informed her of any management or financial decisions, significant or otherwise, for 3D Cycles. This included decisions made regarding the distribution of income and allocation of assets for the Company. She testified that she had "no expectation" that she would be consulted about how the assets of the Company would be distributed. Further, Denise testified that it was "fine by her" that all decisions were made by her parents because it was their company. She acknowledged that she was content with that arrangement. However, Denise qualified her evidence by testifying that she was disinterested because she believed that money from the Company would be "properly distributed".

[40] Denise testified that when she received the letter from Taylor, Tait, Ruley & Company setting out the shareholder distribution from the sale of the Peardonville Property, she was disappointed because she had "expected to get more". She testified that she thought that after enduring both a lawsuit with Darwin and the Small Claims action with her, the defendant would not "do that to us again". Denise testified that she trusted that the defendant was "looking out for the company" and could "not believe that when [the defendant] got caught once, she would do it again". I take this to mean that Denise did not think the defendant would treat her and

Darwin unfairly in respect of sharing with them any financial gains from the Company.

E. Previous Oppression Remedy Proceeding

[41] As referenced above, in June 2019, Darwin brought an oppression remedy action in this Court against the defendant and the estate of his father, David Sr., seeking an amount for unpaid wages and payment of dividends that were issued to him by way of a promissory note as opposed to in cash. After the 2121 Clearbrook Property was sold, there was a dividend paid to the shareholders of 3D Cycles. Darwin's proportionate share totaled $195,144. However, the defendant directed that Darwin, unlike the other shareholders who received their dividends in cash, would receive his dividends as a promissory note. Darwin objected and argued that it was oppressive that he was treated differently than the other shareholders. Mr. Justice Macintosh agreed and ordered that Darwin must be paid his dividends in the same manner as the other shareholders: *Renpenning v. Renpenning* (26 June 2019), Chilliwack S33739 (B.C.S.C.).

[42] I note it is clear from the judgment of Macintosh J. that at the commencement of that trial, the defendant advised the court that she would pay Darwin the amount owed on the promissory note once the Company was wound down and the Peardonville Property was sold. I also note that in the case before Macintosh J., Darwin did not complain about the *calculation* of the dividend to be paid to him. Instead, his complaint concerned the manner in which it was paid (i.e., as a promissory note rather than cash.). As I will discuss below, this is important for the case at bar because, in the proceeding before Macintosh J., Darwin did not raise any issues regarding how the amount of the dividend to be distributed was calculated. In other words, while Darwin objected to the manner in which the dividend was paid out, he accepted the defendant's determination of the amount of Company funds that would be distributed to the shareholders as dividends.

III. Parties' Positions

A. Plaintiffs' Position

[43] The plaintiffs acknowledge that the defendant was the primary decision maker for 3D Cycles' business operations, and that they were passive shareholders while the company was operating. However, they argue that the steps the defendant took specifically in shutting down 3D Cycles violated their reasonable expectations of how, as shareholders, they should be treated in the circumstances. They say the defendant's conduct constituting the breach of these expectations oppressed and unfairly prejudiced them. In their written submissions, the plaintiffs set out their reasonable expectations as follows:

> In summation, the Plaintiff says that their subjectively held expectations are/were that they would receive their proportion share of the assets of the Company upon the wind-up, in a manner that was fair – specifically, a share of the remaining proceeds of the Company undiminished by self-preferential dealing by the Defendant.

[44] In particular, the plaintiffs assert that as a director of 3D Cycles, the defendant oppressed or otherwise unjustly prejudiced them through the following conduct: (a) paying herself excessive wages in 2018 and 2019; (b) paying herself retroactive wages for 2011 to 2017; (c) directing that the Company pay her legal fees in defending this oppression remedy action; (d) paying herself a retirement bonus; and (e) failing to properly account for and abusing her shareholder loans with 3D Cycles.

[45] The plaintiffs also argue that since the conduct animating their claim occurred when the defendant was shutting down the Company, the past practices of 3D Cycles (i.e., when the business was operating) are of limited assistance in determining their reasonable expectations. In other words, they claim that in relation to this action, the 'normal' business operations of the Company do not inform their reasonable expectations. Conversely, the plaintiffs say a situation comparable to the circumstances at issue in this case is the Company's sale of the 2121 Clearbrook Property in 2016. In that respect, they argue that the defendant's decision at that time to withhold paying Darwin's dividends in cash demonstrates that the defendant,

in circumstances analogous to those at bar, was unwilling to fairly distribute the Company's assets to shareholders.

[46] Given the foregoing, I characterize the plaintiffs' stated expectation as follows: they expected that they would be treated fairly as the Company was shut down, in the sense that the defendant would not direct that excessive and unreasonable amounts of the Company's assets would be paid to the defendant, as opposed to being shared amongst the shareholders.

[47] I note that, with respect to relief, the plaintiffs ask that the defendant be ordered to pay a proportion of the purported amounts of over-payment directly to the plaintiffs, as opposed to repayment to the Company for redistribution to the shareholders. For instance, the plaintiffs allege that the over-payment of the defendant's wages for 2018 and 2019 totals $106,558.84. They request that this amount be shared amongst the shareholders in proportion to their share ownership. Using this example, Darwin would receive $28,419.02 (equivalent to 26.67% of $106,558). I note that in the plaintiffs' written submissions there appears to be a slight calculation error, as the amount proposed is $28,417.47, but I find nothing turns on this error.

[48] As I discuss below, in my view this is a flawed approach. It fails to account for the tax implications of payments made to the defendant as salary. Further, in essence it turns employment income payable to the defendant into dividend income to the plaintiffs. This may have additional tax consequences for the individual parties and the Company.

B. Defendant's Position

[49] The defendant emphasizes that since David Sr. passed away, she alone has made the decisions for 3D Cycles, and that the plaintiffs have never made decisions regarding the financial operations of the Company. The defendant says that for as long as the plaintiffs have been shareholders of the Company, they expected and accepted that the defendant (along with David Sr., when he was alive) would set

employees' remuneration and determine the amount to be allocated as dividends for distribution to the shareholders. She argues that the plaintiffs were happy to receive benefits from the Company during its time of operation, including dividends and, in the case of Darwin, a place to be employed for 38 years.

[50] In respect of her remuneration, the defendant asserts that she was chronically underpaid for the work she did for the Company, and made the decision to take less money each year to help keep the business running. However, now that the Company is ceasing operations, she believes it fair that the Company compensate her for her contribution.

[51] In response the plaintiffs' argument that the defendant has improperly appropriated funds in the guise of repayment of shareholder loans, the defendant asserts that she has loaned 3D Cycles money legitimately to keep the business running and is entitled to repayment for those loans. She says that the Company's records demonstrate that she wrote cheques to the Company, and those amounts appear on the Company's shareholder loan account.

[52] In terms of the retirement allowance of $130,000, the defendant says the amount represents approximately two years of salary, and is fair in the circumstances because she has worked for the Company for almost 50 years. She says she requires this money for her retirement. She notes that in their evidence at trial the plaintiffs did not seriously question the decision to provide other employees of 3D Cycles retirement allowances.

[53] In essence, the defendant says the plaintiffs had no reasonable expectation to be involved with making decisions about the Company's finances while it was being shut down, as they were never involved in the past. She further says that the steps she took to compensate herself were not "self-dealing". As referenced above, she argues these payments legitimately recognized her contributions in time, money, and effort to the Company. The defendant denies that any of the decisions she made on behalf of the Company were made to disadvantage the plaintiffs, and

denies that any of the impugned decisions oppressed or unfairly prejudiced the plaintiffs. The defendant says that both she and the plaintiffs knew that the purpose of the business was to provide an income for and fund the retirement of herself and (before he died) David Sr., as well as to provide for their children.

[54] Finally, in respect of the resolution she passed to have the Company indemnify her for legal fees in these proceedings, the defendant asserts that it is reasonable for an executive to have his or her legal expenses paid by a corporation to defend against litigation arising from decisions made in the course of operating the business.

A. Legal Principles

[55] The plaintiffs seek an oppression remedy pursuant to s. 227 of the *BCA*. The leading case regarding the oppression remedy is *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 [*BCE*].

[56] In *BCE*, the Supreme Court of Canada discussed the oppression remedy in the context of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [*CBCA*]. That legislation contains a provision similar (but not identical) to s. 227 of the *BCA*. Namely, s. 227 of the *BCA* provides the court with powers to remedy a situation in which it determines a shareholder has been oppressed or unfairly prejudiced. While the *BCA* provides the court with a number of ways to remedy a finding of oppression, the plaintiffs in the case at bar appear to seek the remedy provided under s. 227(3)(j): i.e., for the court to set aside certain transactions of the Company made at the direction of the defendant, and to direct the defendant to compensate the plaintiffs.

[57] In *BCE*, the Court explained that oppression remedies are a form of equitable remedy. They are thus aimed at achieving fairness, as an overarching goal, in the specific facts of the claim:

> [58] First, oppression is an equitable remedy. It seeks to ensure fairness — what is “just and equitable”. It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair … It follows that courts

> considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.
>
> [59] Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

[58] With the above principles in mind, the Court in *BCE* set out a two-step framework for assessing oppression claims. First, the court must determine whether the evidence supports the reasonable expectation asserted by the claimant. Second, assuming it does, the court must then determine whether the evidence establishes that the claimant's reasonable expectation was violated by conduct that falls within the terms "oppression" or "unfair prejudice": *BCE* at para. 68. I note that the *BCA*, unlike the *CBCA*, does not reference the term "unfair disregard" as an actionable form of conduct that a majority shareholder or director may exhibit in violating the reasonable expectations of a stakeholder.

[59] It is settled that the *BCE* framework applies to claims under s. 227 of the *BCA*. To that end, in *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193, Justice Savage succinctly summarized the general principles of the oppression remedy in the context of s. 227, as follows:

> [111] Section 227 of the BCA sets out the statutory right to relief invoked by the petitioners:
>
> > (1) For the purposes of this section, "shareholder" has the same meaning as in section 1(1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.
> >
> > (2) A shareholder may apply to the court for an order under this section on the ground
> >
> > > (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
> > >
> > > (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

> [112] To be entitled to relief under the oppression remedy a petitioner must show that it held a reasonable expectation with respect to the conduct of the affairs of the company, and that the reasonable expectation was disappointed by conduct that was oppressive or unfairly prejudicial. The reasonable expectation must be assessed on an objective and contextual basis: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 62, 68.
>
> [113] The reasonable expectations of the shareholders are assessed in a two-stage process. First, the subjective expectations of the complainant must be established. Second, an objective analysis of the complainant's expectations must be conducted to determine whether the expectations were reasonable.
>
> [114] When analysing decisions of directors, the court applies the business judgment rule: that is, deference should be accorded to business decisions of directors taken in good faith in the performance of their duties. Directors owe their duty to the corporation, not to the shareholders, and the reasonable expectation of shareholders is simply that the directors act in the best interest of the corporation.
>
> [115] In considering proof of a claimant's reasonable expectations, the Supreme Court of Canada in *BCE* distils from the cases the following factors which form its analytical framework: general commercial practice, the nature of the corporation, the relationship between the parties, past practice, steps the claimant could have taken to protect itself, representations and agreements, and the fair resolution of conflicting interests between corporate stakeholders.

[60] Turning to the first step of the *BCE* test, I note that the reasonable expectations of stakeholders have been described as the "cornerstone of the oppression remedy": *Boffo Family Holdings Ltd. v. Garden Construction Ltd.*, 2011 BCSC 1246 at para. 110. As referenced in *Jaguar*, in considering what expectations are reasonable, a court must consider the expectations objectively and contextually: *BCE* at para. 62. The inquiry specifically looks to the reasonableness of the expectations within the *corporate* context in which they arise: *Callahan v. Callahan*, 2022 BCCA 387 at para. 39, leave to appeal to SCC filed, 40557 (20 January 2023).

[61] In this respect, the Court in *BCE* provided a non-exhaustive list of seven factors for the court to consider: "general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders": at para. 72. In

addition to these factors, the Court also noted that, "it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment": *BCE* at para. 70.

[62] An important aspect of this case, which impacts on the assessment of the plaintiffs' reasonable expectations, is that it involves a family-owned business. Our Court of Appeal in *Hui v. Hoa*, 2015 BCCA 128, specifically addressed the interplay and tension arising in oppression remedy cases like this between the legal rights of a shareholder and family dynamics:

> [38] The oppression remedy derives from corporate law. It sits uncomfortably in the context of family disputes, where sometimes corporate positions are used as weapons. In my view, it is essential to examine the corporate rights of the parties as stakeholders in the corporation, not as members in a family. There is a risk that value judgments on the conduct of family members will distort an analysis of their rights as shareholders.
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> …
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> [40] That is not to say that familial or personal realities are irrelevant to the analysis; rather, they are often central to the determination of the relationships and expectations between the parties. In *Ferguson v. Imax Systems Corp*. (1983), 1983 CanLII 1646 (ON CA), 43 O.R. (2d) 128, [1984] O.J. No. 3156, an oppression remedy was granted on appeal to an ex-wife who, after many years of working for a closely held corporation, was frozen out by her ex-husband through a resolution reorganizing the company's capital. The court noted that in "dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (at 137). The court's analysis was rooted in the wife's role as a non-controlling shareholder and in the finding that she was entitled, based on all considerations both corporate and familial, to relief in light of her expectations as a shareholder. Her expectations were rooted in the corporate reality.

[63] I turn now to the second component of the *BCE* framework. To recall, if the court determines that there is a breach of the claimant's reasonable expectations, the claimant must then demonstrate that the conduct complained of amounts to "oppression" or "unfair prejudice": *BCE* at para. 56; see s. 277(2) of the *BCA*. The Court in *BCE* discussed this second inquiry as follows:

> [67] Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard"

> of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations …

[64] The Court in *BCE* further elaborated on the meaning of "unfair prejudice", as distinct from the concept of "oppression", in the following terms:

> [93] The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see *Koehnen*, at pp. 82-83.

[65] Additionally, the court in *Urquhart v. Technovision Systems Inc.*, 2002 BCSC 172, aff'd 2003 BCCA 45, provided the following guidance as to the distinction between oppressive and unfairly prejudicial conduct:

> [35] The law that governs what can be said to be "oppressive" and what can amount to "unfair prejudice" has not developed with great clarity. Generally, founded on what Viscount Simon said in *Scottish Co-op Wholesale Soc. Ltd. v. Meyer*, [1958] 3 All E.R. 66 at 71, "oppression" has been said to mean conduct that is burdensome, harsh, and wrongful or, following what Lord Keith said at p. 86, it is said to mean conduct that lacks probity and fair dealing in the affairs of the company to the prejudice of some of its members. "Unfairly prejudicial" has been distinguished as having a broader meaning protecting a wider range of rights, but it has not been, and perhaps cannot be, as well defined.
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> [36] In *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1976 CanLII 238 (BC SC), 1 B.C.L.R. 36, which appears to have been the first consideration of the term in the context of the oppression remedy, this court equated that which is unfairly prejudicial to that which is unjust and inequitable. In so doing, Lord Wilberforce's discussion of those words in *Ebrahimi v. Westbourne Galleries Ltd.* (1972), 2 All E.R. 492, in the context of what was then the English statutory oppression remedy was cited at some length. There it was recognized (p. 500) that behind the legal entity a company represents "there are individuals with rights, expectations, and obligations *inter se* that are not necessarily submerged in the company structure" which the remedy enables the court to invoke equity to protect.

> [37] The words “oppressive” and “unfairly prejudicial” have been further distinguished by this court in that the focus with regard to “oppression” has been seen to be on the character of the conduct complained of while the focus in considering what is said to be “unfairly prejudicial” has been on the effect of the impugned conduct on the injured shareholder.

[66] From the governing legal principles set out above, to be successful in this case the plaintiffs must establish the following:

- their asserted expectations were reasonably held;
- those reasonably held expectations were violated by the defendant; and
- the violation arose from conduct that oppressed or unfairly prejudiced the plaintiffs as shareholders.

B. Analysis and Determination

[67] I will first provide an objective and contextual analysis of the expectations of the plaintiffs in this case, informed by the particular circumstances of the Company and the relationships between the parties. If I find the plaintiffs’ asserted expectations reasonable, and if I find those reasonable expectations were violated by the defendant, I will consider if the violation amounts to conduct that was oppressive or unfairly prejudicial to the plaintiffs as shareholders.

A. What were the Plaintiffs’ Expectations?

[68] As set out above, I find the plaintiffs generally expected that the defendant would make all strategic and operational decisions for the Company, without consulting the plaintiffs or asking for the plaintiffs’ input. In particular, I find that the plaintiffs expected and accepted that the defendant (and before he died, the defendant and David Sr.) would make decisions for the Company that included the following:

- setting the remuneration for employees of the Company;
- establishing the amount, if any, to be distributed as dividends to the shareholders in proportion to the shareholders’ ownership;

- making legal decisions for the Company including which law firm to retain, if required, and the professional fees to be paid to those firms;
- making financial and accounting decisions for the Company, including obtaining financing, as well as choosing which accounting firm to retain and the professional fees to pay to those firms; and
- making strategic decisions for the Company regarding whether to purchase or sell locations from which to operate the Company and determining the price at which properties would be bought and sold.

[69] However, underlying the practice that the defendant made all important decisions for the Company without the input of the plaintiffs is an expectation that the decisions made by the defendant would be fair to the plaintiffs. This included an expectation that the defendant would not pay herself excessive amounts from the assets of the Company. It is this specific expectation that animates the plaintiffs claims concerning decisions made by the defendant in the process of shutting down 3D Cycles' operations respecting her (contemporaneous and retroactive) remuneration, retirement allowance, and indemnification for legal fees.

B. Were the Plaintiffs' Expectations Reasonably Held?

[70] To reiterate, the adjudication of an oppression remedy claim—including determining whether an expectation held by a corporate stakeholder was reasonable—is fact-specific: *BCE* at para. 59. Naturally, various factors can inform the assessment of an expectation's reasonableness: see *BCE* at para. 72. In my view, in this case, which involves a closely-held family corporation, the following factors are of particular importance: the nature of the corporation; the relationship between the parties; and the past practice of the corporation. I will address these factors generally, before turning to each of the plaintiffs' complaints.

The Nature of the Corporation, the Relationship between the Parties and Past Practices

[71] With a view to the above factors, this case clearly raises some of the issues addressed by our Court of Appeal in *Hui*. Informed by *Hui*, I note that the oppression

remedy sought in this matter seems to sit uncomfortably with the family context that colours the dispute, and in particular the expectations of the parties as family members may have collided with their respective expectations as corporate stakeholders. Indeed, one corollary of my findings respecting the plaintiffs' general passivity in corporate decision-making is that the defendant likely felt that the Company was, in essence, 'hers'. In particular, the defendant may have understandably believed that because she had made all of the decisions for the Company for almost 50 years, it was her right to continue to do so with little regard for or input from the plaintiffs.

[72] Yet, the oppression remedy is designed to ensure that corporate power is exercised in a way that reflects and protects the legal rights of stakeholders, and especially to correct past injustice or unfairness between the parties: see *JBRO Holdings Inc v. Dynasty Power Inc*, 2022 ABCA 140 at para. 60, citing *Wilson v. Alharayeri*, 2017 SCC 39 at paras. 26–27.

[73] In objectively and contextually assessing the plaintiffs' asserted expectation, I am informed by the different corporate roles that the defendant held at the Company. Conceptually, and expressed colloquially, the defendant wore several hats in relation to 3D Cycles. She was a founder, shareholder, director, chief executive officer, and employee. Each of these roles attached different responsibilities, obligations, and benefits to the defendant. While the roles are related because they were performed by the same person, it is helpful for the analysis to consider the defendant's treatment by the Company in *each* of her roles.

[74] For example, the defendant's remuneration and retirement allowance as an *employee* give rise to their own expectations, considerations, and notions of fair treatment. Namely, putting aside her position as the majority shareholder and director, and imagining for the sake of the analysis that the defendant were instead an unrelated third party, I find that her position as an octogenarian who had worked for the Company for almost 50 years would require the Company to have particular regard for her financial wellbeing and her contributions to its past success, especially when she suddenly found herself without work because the Company ceased to

operate. Of course, these considerations must be informed by the reality that the defendant was not a disinterested party and participated in her various roles contemporaneously.

[75] With the foregoing in mind, I find that an objective and contextual analysis of the nature of the Company, its past practices, and the relationships between the parties provides that the plaintiffs were disinterested and passive shareholders who took no meaningful steps to participate in the decision making of the Company. The plaintiffs' had no reasonable expectation to be consulted in the defendant's decision regarding the Company's financial decisions, including in relation to her remuneration, as the Company was being shut down. However, the plaintiffs had an underlying and *reasonable* expectation to be treated fairly by the defendant in her roles as both director and majority shareholder. This reasonable expectation meant that the defendant did not have free reign to direct that corporate assets be paid to her in an excessive manner that unfairly prejudiced the plaintiffs. To conclude otherwise—i.e., to determine that because the defendant had made all of the decisions in the past for the Company, she can do so with *impunity*—has the potential to trample on the legal rights of 3D Cycles' shareholders, and ignores the fiduciary duty of a director to the Company and its shareholders.

C. Were the Reasonable Expectations of the Plaintiffs Violated by the Defendant's Conduct? If so, were the Violations Oppressive or Prejudicial?

[76] Having found that the plaintiffs' general expectations about fair treatment by the defendant in relation to the distribution and allocation of 3D Cycles' assets were reasonable, I will now review the alleged conduct of which the plaintiffs complain to determine whether it violated those reasonably-held expectations. If I determine that any such violation occurred, I will then consider whether the conduct constituting the violation oppressed or unfairly prejudiced the plaintiffs.

i. The September 21, 2018 Directors Resolution

[77] As I understand the plaintiffs position, they argue that a directors resolution effective September 21, 2018 purporting to direct that the defendant and David Sr.

would each receive an amount to compensate them for unpaid salary of $5,000 a month for the five previous years for a combined total of $600,000 is oppressive conduct. I note that in the plaintiffs' written and oral submissions reference is made to a directors resolution of "September 2021." I was unable to find any evidence before me of directors resolutions dated September 2021. As such, I have presumed that the plaintiffs complain of the September 21, 2018 resolutions. The plaintiffs argue that although these resolutions were not acted upon, they provide context and "set the stage" because it was a step taken by the defendant to "even the field" against Darwin to increase the defendant's share of the Company's money otherwise available to the shareholders. In that sense, the plaintiffs submit these resolutions highlight an ongoing pattern of conduct by the defendant to oppress or unfairly prejudice the rights of the plaintiffs and set the stage for the past remuneration the defendant ultimately paid herself.

[78] A stakeholder must establish that the failure to meet the reasonable expectation was a consequence of wrongful conduct and that the conduct caused compensable injury: *Stahlke v. Stanfield*, 2010 BCSC 142 at para. 19, aff'd 2010 BCCA 603. As the September 2018 resolutions were not acted upon, no injury was caused by it, and there can be no remedy.

[79] That said, as suggested by the plaintiffs, I will take these resolutions into account as part of the context of this case. I find doing so appropriate because, where there are multiple alleged oppression claims, those claims should be analyzed together, because the court is to address allegations of oppressive or unfairly prejudicial conduct "in combination and context, rather than in isolation": see *Azam v. Andrews Custom Furniture Designs Inc.*, 2022 BCSC 1166 at para. 44.

ii. Payment of the Defendant's Legal Fees by 3D Cycles

[80] The plaintiffs assert that the direction by the defendant that the Company pay her legal fees in this action was a "clear abuse of power". They emphasize the effect of the direction was to shift the cost consequences of this action entirely onto the plaintiffs. They argue that the legal fees resolution was intended to insulate the

defendant from the consequence of undertaking oppressive conduct against the plaintiffs, should it result in litigation. As relief, the plaintiffs seek repayment of legal fees paid by the Company for the defendant in defence of this claim. While as the litigation continues the legal fees will increase, I understand that leading up to the trial this amount was approximately $30,000.

[81] In assessing this claim, it is again helpful to view the various roles of the parties in their different capacities. In this respect, I find that generally it is reasonable for a director operating in good faith to be indemnified for legal fees for decisions she made on behalf of the company: e.g., *Unique Broadband Systems, Inc. (Re)*, 2014 ONCA 538 at para. 77. Such indemnification is permissible, and may even be mandatory in some circumstances: see ss. 160–164 of the *BCA*. I also note that even if the defendant were indemnified, she would not be immune from actually bearing part of the expense because, as the largest shareholder, her share of what remains for a dividend will be reduced.

[82] However, in my view, the finding that the Company could have reasonably been directed to reimburse the defendant's legal fees as director is not the end of the story. Namely, if the defendant is found to have acted oppressively or in a manner that is unfairly prejudicial towards the plaintiffs, it strikes me as profoundly unfair that she be indemnified for defending those actions while the plaintiffs must incur her legal fees to obtain their remedy. As such, I will address the issue of the defendant's indemnification of legal fees at the conclusion of this judgment, once I have determined whether the defendant's conduct has oppressed or unfairly prejudiced the plaintiffs.

iii. The Defendant's Remuneration in 2018 and 2019

[83] The plaintiffs argue that the defendant's decision to pay herself wages in 2018 and 2019 of $66,558.84 and $163,148.84, respectively, breached their reasonable expectations and unfairly prejudiced them. They argue that the defendant's remuneration in 2019 in particular—when 3D Cycles generated only $300,440 in revenue and was preparing to stop business operations—was

unjustifiable. They note that the defendant in essence directed herself to receive a salary constituting 54% of the Company's 2019 revenues. The plaintiffs assert that reasonable compensation for the defendant would have been $60,000 in 2018 and $63,148.14 in 2019. Thus, the plaintiffs argue that the defendant was overpaid by $6,558.84 in 2018 and by $100,000 in 2019.

[84] In response, the defendant says that in 2019, she was required to take on additional duties given that the Company was in the process of being shut down. She says that beyond simply running the business, she had to, among other things, make arrangements to liquidate the business's merchandise, arrange to sell the Company's building, and retain and work with lawyers and accountants to facilitate the closing of the business. The defendant says that these extra duties, combined with what she says was her chronic underpayment of salary from the Company for decades, justified a salary of $163,148.84 in 2019.

[85] As previously discussed, the evidence is unequivocal that the plaintiffs could not reasonably expect that the defendant would consult them regarding the amount of her salary. The evidence in fact demonstrates the plaintiffs were never consulted in such a way. The plaintiffs instead accepted and expected that the defendant would set her salary, and admitted on cross-examination that they were "just fine" with that arrangement. However, the plaintiffs reasonably expected, as a component of a broader expectation of fair treatment, that the defendant's salary would not be excessive and would reflect both the performance and past practices of the Company.

[86] I find that the defendant's conduct in directing herself to be paid $66,558.84 in 2018 did not breach the reasonably-held expectations of the plaintiffs. Further, I conclude that this salary was not incongruous with the defendant's previous salaries, and consequently with the plaintiffs' expectations. In that respect, I note the plaintiffs' position that a $60,000 salary would not have been unreasonable for the defendant in 2018. As such, the defendant's actual 2018 salary exceeded the plaintiffs' 'fair' assessment of her salary by approximately 11%. On the evidence before me, for

decades the plaintiffs never challenged adjustments to the defendant's salary, even when those adjustments exceeded an 11% increase or decrease. To reiterate, every year that 3D Cycles operated, the plaintiffs were content to allow the defendant to set her remuneration and the remuneration of other employees, so long as those salaries were fair. In light of these factors, a salary slightly in excess of the plaintiffs' own view of a fair salary—as shareholders who did not expect to be consulted about the defendant's remuneration—did not breach their reasonably-held expectations.

[87] Conversely, and especially in light of evidence at trial of past salaries at 3D Cycles, the salary that the defendant directed for herself in 2019 (representing 54% of the Company's entire revenue for that year) was excessive, and its magnitude breached the reasonably-held expectations of the plaintiffs.

[88] I do not accept the defendant's submission that her 2019 salary was justified as compensation for chronic underpayment for her service to the Company. I find this argument is undermined by two factors. First, she directed that she be compensated for her underpayment of wages through a retroactive wage payment. I will address this payment below. It is sufficient at this stage to note that, on the evidence, it appears the defendant sought to compensate herself twice for her alleged underpayment. Doing so did not respect the reasonable expectations of fair treatment of the plaintiffs. Second, the defendant acknowledged that a fair annual compensation would be in the range of $65,000, and that figure is the basis for the calculation of her retirement allowance. Issues of compensation for past underpayment notwithstanding, a salary $100,000 in excess of what the defendant herself reports would be fair remuneration in her circumstances similarly does not accord with the reasonable expectations of the plaintiffs.

iv. Did the Defendant's 2019 Remuneration Oppress or Unfairly Prejudice the Plaintiffs?

[89] Having found the defendant's decision to direct that she be paid $163,148.84 as salary in 2019 violated the reasonably-held expectations of the plaintiffs, I will now consider whether her conduct oppressed or unfairly prejudiced the plaintiffs

within the meaning of s. 227(2) of the *BCA*. Although oppression remedies cases are highly fact-specific, our Court of Appeal has found that compensation arrangements, in which a majority shareholder pays her or himself excessive management fees or a salary, can amount to oppressive conduct, and that the determination may require a consideration of the magnitude of the remuneration: *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, 2016 BCCA 258 at para. 67, leave to appeal to SCC ref'd, 37186 (19 January 2017) [*CSA*], quoting *Jaguar* at paras. 81–83. In *CSA*, Madam Justice Newbury further discussed the issue of when shareholder self-dealing in the form of management fees will be 'oppressive' as follows:

> [68] There are several authorities that support the proposition that at least in a closely-held corporation, a majority shareholder's appropriation of management fees in disregard of the interests or expectations of the minority may constitute oppression; and that a majority shareholder who treats the company treasury as if it were his or her own will be found to have oppressed the minority. Indeed, in *BCE*, the Court specifically suggested at para. 93 that "preferring some shareholders with management fees" is generally seen as unfair prejudice. (See also the discussion of "self-dealing" in Koehnen, *supra*, at 124-7.)
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> [See also *Radford v. MacMillan*, 2018 BCCA 335 at para. 68.]

[90] In my view, the defendant's decision to pay herself an excessive salary in 2019 constitutes unfair prejudice to the plaintiffs. By choosing to pay herself an excessive salary in 2019, the defendant was engaging in conduct described by the Court in *BCE* as unfairly prejudicial; she effectively paid herself fees (in this case, as a salary) far higher than industry norms (in this case, informed by the defendant's own assessment of fair remuneration and the historic salary norms at the Company): *BCE* at para. 93.

[91] I conclude that while the character of the conduct of the defendant in setting her 2019 remuneration does not rise to the level of oppression—because she was entitled to set her remuneration as she had in the past—the *effect* of directing that she receive such a large amount resulted in unfair prejudice to the plaintiffs. Namely, the effect on the plaintiffs was that they benefited from a significantly reduced amount of retained earnings for distribution to the shareholders because the Company's assets were diminished: *Urquhart* at para. 37.

[92] Further, and to reiterate, the defendant's justification for her 2019 salary as compensation for chronic underpayment does not adequately address the sheer magnitude in the increase of her salary, and other actions she took to remedy her alleged underpayment. Based on the evidence, including the defendant's position in respect of retroactive salary payments matching the amount of Darwin's salary from 2011 to 2017, it appears accepted by both parties that a fair annual salary for the defendant was in the range of $50,000 to $60,000. The *increase* alone in the defendant's salary between 2018 to 2019 was $96,490, or 144%. Further, the 2019 salary exceeded the compensation she says she deserved from 2011 to 2017 that was equivalent to Darwin's annual salary of approximately $50,000 by 226%.

[93] By all of these metrics, the defendant's 2019 remuneration was excessive, unjustified based on the past practices of the Company, violated the reasonable expectations of the plaintiffs, and had an unfairly prejudicial and directly financial effect on the plaintiffs as shareholders. I have also factored into my conclusion the defendant's proposed resolutions in which she directed to have the Company pay her and David Sr. past accrued wages of $600,000. As set out above, while the direction was not acted upon, it provides some context to the defendant's intention to set an excessively high salary for herself that is out of step with her past salaries.

[94] Despite finding a salary of $163,148.84 excessive, I accept that in 2019, the defendant was involved in making decisions related to shutting down 3D Cycles' operations, including selling its inventory and arranging for the sale of the Peardonville Property. In my view, these additional executive decisions should attract additional remuneration. The question, then, is what was appropriate compensation for the defendant in the circumstances?

[95] I conclude that a fair amount of compensation for the plaintiff in 2019 was $70,000. I arrive at this amount alive to the additional duties taken on by the plaintiff, and mindful that, unlike an employee who is tethered to an hourly wage (such as Darwin), the defendant's role in the Company was not easily quantified on an hourly rate. The value she added to the Company from five decades of experience is

difficult to measure. In my view, a salary in 2019 of $70,000, representing $5,000 *more* than the salary the defendant herself characterized as a fair annual amount at trial, appears appropriate to compensate the defendant for the added responsibilities she took on in that year.

[96] The corollary of my finding is that the defendant overpaid herself the amount of $93,148.84 in 2019 (i.e., $163,148.84 minus $70,000). For reasons discussed below, she must repay this amount to the Company (and not directly to the plaintiffs). I note that if some or all of the 2019 remuneration was paid to the defendant through her shareholder loan account, I expect the parties to make appropriate adjustments to the accounts to give effect to this order.

v. Shareholder Loans

[97] Moving to the plaintiffs' remaining oppression claims, the plaintiffs argue that the defendant has failed to account for and justify her shareholder loans made to the Company. They say that her direction for the repayment of the shareholder loan account is suspect. Specifically, the plaintiffs assert the following issues with the defendant's shareholder loans:

- On October 31, 2019, the defendant recorded a shareholder loan of $100,000 payable to her by the Company. Although the funds were paid by way of a cheque from the defendant to the Company that cleared on November 1, 2019, there is no record of those funds coming into the bank account(s) of the Company;

- On December 21, 2019, the defendant recorded a shareholder loan of $20,000 payable to her by the Company, but there is no record of that $20,000 being paid by the defendant, and no record of it being received by the Company;

- On November 22, 2019, the Defendant issued a shareholder loan of $200,000 to the Company. While $100,596.72 of those funds were

directed to pay the balance of Darwin's judgment, the sum of $70,000 was immediately paid to the defendant as wages (net of tax); and

- On December 12, 2019, an additional sum of $6,000 was advanced by the defendant to facilitate payment of $36,384.14 in income taxes owing on December 16, 2019, as a result of the $70,000 wage payment.

[98] The plaintiffs argue that it was unfairly prejudicial that the defendant paid out her shareholder loan account with the proceeds from the sale of the Peardonville Property. They argue that she did not establish that she had, in fact, loaned the company $326,000 between October 31, 2019 and December 21, 2019, and the documents only demonstrate that the defendant loaned the company $100,596.72. In other words, the plaintiffs assert that the defendant has failed to demonstrate that she had loaned the Company $225,403.28 between October 31, 2019 and December 21, 2019.

[99] The defendant asserts that she has properly accounted for her loans to the Company and withdrawals of those amounts in her shareholder loan account. In her testimony, the defendant said that she has a professional book-keeper who tracks the defendant's loans to and withdrawals from the Company. In respect of the October 31, 2019 loan, she points to the Company ledger, which shows she loaned the Company $100,000. To corroborate that loan, the defendant put into evidence her personal bank statements showing a withdrawal of $100,000. While she does not know why the $100,000 does not appear on the Company's bank statements, she asserts that not all of the records for the Company bank statements were before the court. She suggests the discrepancy may have arisen from a timing issue—i.e., of when the deposit was made into the Company's bank account.

[100] I did not take the plaintiffs as strongly pushing this aspect of their claim. In my view, it was an accounting issue that the plaintiffs wanted to question, but did not have evidence that there were, in fact, issues with the shareholder loans. In other words, the plaintiffs' argument essentially rested on the *absence* of evidence that the

defendant had not loaned the Company the amounts she said she did, as opposed to evidence of transactions contradicting the defendant's position.

[101] In my view, the plaintiffs have not adduced evidence to sufficiently ground their oppression claim on the basis that the defendant made improper use of the shareholder loans. I have not been provided with sufficient materials to conduct a forensic audit of the impugned shareholder loans, nor did the parties ask the court to do so. As such, it may be that there are irregularities in how the shareholder loan account was used by the defendant, but for the purposes of the plaintiffs' oppression claim and on the record before me, I am not persuaded that the defendant's conduct in respect of her shareholder loans breached any of the plaintiffs' reasonably-held expectations. In this regard, I also note that the evidence before me established that, generally, over the decades 3D Cycles was in business, the defendant would loan money to the Company if it needed additional funds and repaid herself or borrowed money from the Company if she required additional money and there were sufficient funds in the Company.

vi. The Defendant's Retirement Allowance and Retroactive Pay

[102] The plaintiffs argue that the retirement allowance the defendant directed be paid to herself from 3D Cycles, in the amount of $130,000, breached their reasonably-held expectations. They say this is especially so given that, in addition to the retirement allowance, the defendant further directed that she be paid a retroactive salary totalling $223,000 for the period of 2011 to 2017.

[103] The defendant says that after 50 years of working for 3D Cycles, she was entitled to a retirement allowance. She says $130,000, or two years of an annual $65,000 salary, was an appropriate amount given her years of service to the Company. She argues that the other employees, Byron Williamson and Ronald Block, received retirement allowances, and that she was similarly entitled to receive compensation given her contribution and age. Mr. Block and Mr. Williamson, as employees of 3D Cycles, were paid retirement allowances in the amounts of $26,000 and $36,000 respectively.

[104] As previously discussed, in respect of the retroactive pay that the defendant directed she be paid from 2011 to 2017, the defendant says that she was chronically underpaid in order to financially sustain the Company. Now that the Company is no longer operating, she asserts she is entitled to receive compensation for the years she accepted a lower salary. The defendant emphasizes that although the lump sum payment may seem large, it was calculated by comparing the salary she received with the salary Darwin received in the same timeframe (2011 to 2017). In short, her position is that she is seeking to be paid a fair amount of salary for the many years she decided not to take a full salary for the benefit of the Company.

[105] I will deal with the retirement allowance first and then consider the defendant's retroactive pay.

i. Retirement Allowance

[106] In my view, when viewed in her role as an employee, I find that providing the defendant a retirement allowance based on two years of salary, in recognition of her almost 50 years of service at the Company, was not unreasonable. In this regard, I note that neither Denise nor Darwin took any serious issue with retirement allowances being paid to Mr. Williamson and Mr. Block, the other remaining employees of 3D Cycles. I find it difficult to reconcile the plaintiffs' position of agreeing that it was fair that other employees of 3D Cycles would receive a retirement allowance but that the defendant would not.

[107] As such, it appears that the plaintiffs take issue with the quantum of the defendant's retirement allowance. However, in respect of the 2018 and 2019 salary issue canvassed above, the plaintiffs agreed that a fair annual salary for the defendant would be $60,000 which is not significantly dissimilar to the annual salary of $65,000 that the defendant used to calculate her two year retirement allowance. Further, the plaintiffs provided me with no evidence of labour standards or industry norms to support their submission that the amount of the defendant's retirement allowance was excessive in the circumstances. In my view, there is nothing in the record to support a finding that the plaintiffs' reasonably-held expectations were

violated by the provision of a retirement allowance to the defendant in the amount of $130,000.

[108] Finally, a comparison of the retirement allowances of 3D Cycles' other employees is helpful at this stage. I was not provided with any evidence as to the annual salaries or years of service of Mr. Block or Mr. Williamson. However, to take one example, Mr. Williamson's retirement allowance was approximately 28% of the defendant's allowance ($36,000/$130,000). Given, as I understand the evidence, that Mr. Williamson is the grandchild of the defendant, I infer that his years of service at the Company and his contribution to 3D Cycles did not approach those of the defendant. I recognize this is a crude assessment, but in my view, it underscores that the defendant, as an employee with decades of service, should be entitled to a retirement allowance, and that the magnitude of the allowance she directed be paid to herself was acceptable.

[109] Accordingly, the plaintiffs have not demonstrated that the defendant's retirement allowance violated their reasonably-held expectations as shareholders. It is unnecessary to consider the second component of the *BCE* test.

ii. Retroactive Pay

[110] Moving to the retroactive pay issue, the defendant directed that she be paid $243,000 in retroactive pay. She calculated this amount based on the difference between Darwin's salary and the salary of the defendant for the period of 2011 to 2017:

Year	**Darwin's Wages**	**Defendant's Wages**	**Difference**
2011	$50,844	$12,800	$38,044
2012	$55,037	$35,200	$19,837

2013	$56,909	$28,800	$28,109
2014	$53,997	$28,800	$25,797
2015	$51,200	$17,800	$33,400
2016	$51,500	-	$51,500
2017	$25,800 (6 months)	$5,000 (12 months)	$46,600
Total Difference			**$243,287**

[111] I find the comparison provided in the above table compelling. In my view, the Company, as directed by the defendant (and David Sr. when he was still living), underpaid the defendant for her work at the Company from 2011 to 2017 based on a direct comparison to what Darwin earned.

[112] The defendant testified that she underpaid herself in order to keep money available as necessary for the Company to remain operating. When asked during the trial why she did not reduce Darwin's salary in order to keep money in the Company, the defendant testified that if she did, Darwin would have quit. I accept this evidence, and further accept that when the Company sold the Peardonville Property and had funds, she wanted to be compensated for the years she was underpaid.

[113] There is no evidence that the plaintiffs ever took issue or had any concerns when the defendant set her salary. Further, as set out before, in cross examination Darwin testified that a fair annual remuneration for the defendant would be $60,000. This evidence supports a finding that the plaintiffs expected and accepted that the defendant would set her remuneration, and that setting it at a level similar to

Darwin's salary would not have been excessive. It strikes me as disingenuous for the plaintiffs to assert that it is unfair the defendant now wants to adjust her salary to an amount that the plaintiffs accept is a fair wage—and a wage equivalent to Darwin's wage while he worked at 3D Cycles. Accordingly, I find no merit in the plaintiff's argument that the defendant breached the plaintiffs' reasonably-held expectations by directing that she be entitled to compensation for the years she deliberately underpaid herself in order to assist the Company's operations.

[114] Given I find that the defendant's direction that she be paid retroactive salary for the period of 2011 to 2017 did not violate any of the plaintiff's reasonably-held expectations, I need not consider the next stage of the *BCE* inquiry.

D. Oppression Conclusion

[115] In summary, I find that, viewed objectively and contextually, the defendant's conduct as a director of 3D Cycles did not breach the reasonably-held expectations of the plaintiffs, with the exception of the defendant's decision to pay herself an excessive remuneration in 2019. This sole violation also, in my view, amounted to conduct that unfairly prejudiced the plaintiffs as shareholders.

[116] However, having found a discrete instance of conduct by the defendant warranting application of the oppression remedy, I do not accept the plaintiffs' proposal that the defendant be required to pay the amount of overpayment directly to the plaintiffs in proportion to their share ownership. In my view, this fails to account for tax implications of the payment of employment income to the defendant, and tax implications of dividend income to the plaintiffs.

[117] I expect that returning the funds instead to the Company will require additional accounting, and possibly a process of seeking re-assessment of income tax returns. Yet, in my view, ordering repayment to the Company is the appropriate process to ensure that amounts are ultimately paid fairly to the parties and reflect the appropriate tax consequences.

C. Clean Hands and Equitable Remedies

[118] During closing submissions, I raised the issue of whether the fact that Darwin has failed to repay the Promissory Notes to the Company from the loans he received to fund his divorce proceedings disentitled him from claiming an equitable remedy because he did not have "clean hands." It is well-established that equity will not reward those who come with unclean hands: e.g., *790668 Ontario Inc. v. D'Andrea Management Inc.*, 2017 ONCA 1019 at para. 14.

[119] However, on an application for equitable relief where neither party has come with 'clean hands', the court need not decipher which party is more to blame. Put differently, where relative fault is the issue, "the clean hands doctrine seems largely irrelevant". Moreover, determining whether to refuse equitable relief on the basis that a party failed to come with clean hands falls within the discretion of the trial judge, and such a failure is not an absolute bar. See *Petersen v. Hawley*, 2022 BCCA 169 at paras. 13–14, aff'g and quoting 2021 BCSC 2348.

[120] As previously discussed, the evidence before me was that Darwin entered into four promissory notes with the Company for a total of approximately $29,000 plus interest. Darwin has not repaid the amounts owing on these notes, and according to the testimony of both the defendant and Darwin, he had no intention of repaying them. At first blush, I found this fact to be unsavoury. I found it difficult to accept that Darwin alleged the defendant was irresponsible with the funds of the Company, and yet he had no intention of meeting his obligations to the Company by repaying his debts.

[121] Plaintiffs' counsel argued that collection of the Promissory Notes does not disentitle the plaintiffs to an equitable remedy on the basis of issue estoppel, given that the issue was addressed by Macintosh J. in the trial before him in 2019.

[122] Having now had the benefit of reviewing Macintosh J.'s decision, I am satisfied that Darwin's failure to repay the Promissory Notes, while hypocritical and unsavoury, does not engage the clean hands doctrine, because collection of those notes is statute-barred. Further, I accept that, as described by Macintosh J., the

Promissory Notes were related to Darwin's expenses arising from his divorce and custody issues, and not related to the business of 3D Cycles. As such, the loans were of a personal nature and appear to have been put through the Company either due to cash flow issues for the defendant and David Sr., or for some cost-savings purpose. In any event, as no action was taken on the Promissory Notes and the issue was before Macintosh J., I find that the fact Darwin has not repaid his outstanding obligation to the Company does not prevent him from seeking and receiving an equitable remedy in this matter.

D. Indemnification for the Defendant's Legal Fees

[123] I indicated above that I would return to the issue of the defendant's direction that the Company pay her legal fees for her defence of this trial. I determined that generally it would be reasonable for a director operating in good faith to be indemnified for legal fees for decisions she made on behalf of a corporation. It follows that the plaintiffs could not generally and reasonably expect that the defendant could never be indemnified for legal fees arising from litigation concerning her conduct as a director.

[124] Yet, in my view, the finding that the defendant has breached, at least in part, her obligations to the plaintiffs should impact on the propriety of the Company paying her legal expenses. Namely, having found the defendant breached the plaintiff's reasonable expectations in an unfairly prejudicial manner by paying herself an excessive salary in 2019, it follows the plaintiffs were justified in bringing this action against the defendant.

[125] Thus, I find it would be unreasonable to effectively require the plaintiffs to fund, from the assets of the Company, the defendant's legal fees. Doing so would mean the plaintiffs are obligated to fund the legal defence of conduct that has unfairly prejudiced them. This result strikes me as increasing the unfairness of the circumstances. I am also concerned that in similar circumstances, absent intervention, a majority shareholder could direct that a company fund the defence to oppression claims for the purpose of chilling a minority shareholder's right to seek a

legal remedy, because the expense of the litigation would reduce any amounts available for distribution from the sought equitable relief.

[126] In this respect, courts have previously considered whether it is proper for a corporation to indemnify a party defending an oppression remedy claim. If a defendant's behaviour is found to be oppressive, it has been found to be more unjust that the corporation, and thus the shareholders, pay to defend that behaviour. This seems to be particularly true in the context of closely-held family businesses. For instance, in *Naneff v. Con-Crete Holdings Ltd.*, (1993) 11 B.L.R. (2d) 218, [1993] O.J. No. 1756 (S.C.), rev'd in part 23 O.R. (3d) 481, 1995 CanLII 959 (C.A.), Mr. Justice Blair (as he then was), found that, since the defendants were found to have oppressed the rights of the shareholders, the corporation should not reimburse those defendants for the costs associated with the proceedings. Mr. Justice Blair stated (at 264):

> On much the same basis, I have concluded that the individual defendants should reimburse the corporate defendants for whatever legal fees and disbursements those companies have paid in connection with these proceedings.
>
> …
>
> This was not a battle between Alex Naneff and the Rainbow Group of companies. It was a battle between Alex Naneff and his parents and brother. I have found against the latter. It is they who should bear the costs of the proceedings. To the extent that corporate funds have been utilized to pay the costs of the proceedings, those funds represent assets which properly belong, in the circumstances of this case, to the corporations.

[127] In my view, the same reasoning applies to the case at bar. This was a battle between Darwin and Denise Renpenning against Lillian Renpenning. In my view, 3D Cycles should not fund the defendants claim. While I may have come to a different conclusion had the defendant been successful on all of the claims at bar, having found that she acted in a manner that was unfairly prejudicial to the plaintiffs in respect of her 2019 remuneration, I find the plaintiffs appropriately brought this action.

[128] As such, any funds advanced to the defendant under the resolution of 3D Cycles passed on July 1, 2021, relating to the indemnification of the defendant for fees in this matter, are to be repaid by the defendant to the Company for redistribution to the shareholders.

E. Disposition

[129] Pursuant to s. 227(3)(j) of the *BCA* the court orders:

- The defendant must repay to 3D Cycles the amount of $93,148.84, from the amount she was paid as remuneration for 2019;
- The defendant shall repay to 3D Cycles all legal expenses paid in relation to this proceeding paid by 3D Cycles on her behalf; and
- After the above amounts have been repaid to 3D Cycles, those amounts shall be distributed amongst the shareholders in accordance with their share of ownership in 3D Cycles, should there be sufficient funds to do so.

[130] If there are matters arising from this order that the parties are unable to resolve, they may contact Trial Scheduling within 30 days of the date of this order to make arrangements to appear before me for that purpose. If such an appearance is scheduled, the parties will be required to exchange and file brief written submissions in advance of the hearing setting out their positions.

F. Costs

[131] In my view, there has been mixed success in this trial. The plaintiffs have been successful on two of their oppression claims. As well, without bringing this action, the plaintiffs would not have recovered amounts rightfully owed to them as shareholders in respect of the 2019 remuneration issue. Yet, the defendant has been successful in defending the balance of oppression claims brought against her. In light of this mixed success, I order that the parties shall bear their own costs personally.

[132] For greater clarity, in ordering that the parties are to bear their own costs, I am cognizant of my previous finding that the defendant unfairly prejudiced the plaintiffs by directing that the Company fund her defence of these claims. This prior finding, however, does not entitle the plaintiffs to their costs in this action. Instead, now that the matter has been adjudicated and its (mixed) outcome decided, I find it is appropriate for each of the parties in their personal capacities to bear their costs of this action.

[133] If there are any issues in respect of costs of which I am unaware, the parties have leave to file written submissions within 30 days of the date of this judgment. Any response to those submissions shall be filed within 15 days thereafter. The parties may then arrange through Trial Scheduling to appear before me for the purpose of arguing the issue of costs.

G. Conclusion

[134] I express my thanks to counsel for both parties for their helpful and well-prepared presentation of this case.

[135] Finally, I wish to note, while not directly relevant to the issues before me, that there appears to be a high level of disharmony between the parties. I do not have the complete history or context of what may underlie this animosity. However, I know that in the proceeding before me, I witnessed what I perceived to be a family in some level of emotional pain, perhaps using the court process to settle grievances that may relate to issues involving more than just the distribution of money. In this regard, I echo the comments of Macintosh J. in his oral reasons for judgment, as I believe they are equally applicable to the case before me:

> [2] This case reveals a sad and bitter fight between mother and son, and the 3-D business is ground zero in their dispute.

[136] It appears unfortunate to me that a business started with the intention of bringing a family together in a joint endeavour and providing financially for the family unit has, instead, resulted in conflict, division, and dissipation of the family's financial

gains through litigation. Indeed, I expect that any of the plaintiffs' success in this matter may be a pyrrhic victory, in that their legal fees may exceed any amounts they recoup in additional dividends.

[137] I mention this only to bring to the parties' attention something that they likely already know. Resolving specific financial disagreements in court is unlikely to heal the underlying wounds in the family, which, left unaddressed, may result in future litigation. This will inevitably require the parties to expend more economic and emotional resources. It is my hope that this family might be able to move beyond these financial disagreements towards some form of emotional resolution, or at least some level of tolerance.

"Gibb-Carsley J."