COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McDougall v. Knutsen,*
2024 BCCA 55

Date: 20240221
Docket: CA48934

Between:

Donald Geoffrey McDougall and 0838697 B.C. Ltd.

Appellants
(Plaintiffs)

And

Scott Walker Knutsen, Anik Gagnon, Cobra Integrated Systems Ltd., KKBL No. 617 Ventures Ltd. and 614844 B.C. Ltd.

Respondents
(Defendants)

Before: The Honourable Justice Griffin
The Honourable Mr. Justice Abrioux
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated February 13, 2023 (*McDougall v. Knutsen*, 2023 BCSC 211, Vancouver Registry Docket S1912340).

Counsel for the Appellants:	T.D. Goepel
Counsel for the Respondents:	A.S. Dosanjh G. Boothroyd-Roberts
Place and Date of Hearing:	Vancouver, British Columbia January 11, 2024
Place and Date of Judgment:	Vancouver, British Columbia February 21, 2024

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Justice Griffin
The Honourable Justice Skolrood

Summary:

This appeal arises from the breakdown in the relationship among three experienced business persons in connection with a closely-held corporation. The appellants argue that the respondents' conduct was oppressive and breached their reasonable expectations that an anticipated Corporate Reorganization would close.
Held: Appeal dismissed. The judge made no reviewable error in concluding that the respondents' conduct was not oppressive.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] This appeal arises from the breakdown in the relationship among three experienced business persons in connection with a closely-held corporation, Cobra Integrated Systems Ltd. ("Cobra"), following which the appellants sought oppression remedies under s. 227 of the *Business Corporations Act,* S.B.C. 2002, c. 57 [*BCA*]. These were dismissed at trial on the grounds that no reasonable expectations were established by the appellants nor were they breached by the respondents' conduct.

[2] An oppression claim is to be heard by petition. In this case, however, a claim for damages for wrongful dismissal and for dismissal without cause was also advanced and was alleged to form part of the course of conduct which constituted oppression. Accordingly, the underlying proceeding was commenced by Notice of Civil Claim. The action proceeded to trial with *viva voce* evidence over several days. Damages were awarded to the appellant, Geoff Co., on the wrongful dismissal claim. No challenge is taken by the parties to this portion of the judge's order.

[3] For the reasons that follow, I would dismiss the appeal. In my view the judge made no reviewable error in concluding that no reasonable expectations had been established or that the respondents' conduct was not oppressive.

Background

[4] The background is reviewed in some detail in Justice Funt's reasons for judgment which are indexed as 2023 BCSC 211. The following relates to the issues on appeal.

[5] In 2000, the respondent, Mr. Scott Knutsen, by way of his holding company 614841 B.C. Ltd. ("Scott Co.") acquired Cobra along with Mr. Brian Sylvester, by way of his holding company 614844 B.C. Ltd. ("Brian Co."). On April 24, 2015, Brian Co. was acquired by Cobra and Mr. Sylvester ceased being a director of Cobra. Mr. Sylvester is not a party to this appeal.

[6] The appellant, Mr. Geoff McDougall, became employed by Cobra in 2005 and by way of his holding company 0838697 B.C. Ltd. ("Geoff Co.") became a minority shareholder in Cobra in 2011.

[7] Later in 2011, a shareholders' agreement (the "2011 Shareholders' Agreement") was entered into by the shareholders of Cobra which, among other things, was taken to represent the reasonable expectations of the parties.

[8] Part 5 of the 2011 Shareholders' Agreement provides:

> 5.1 Buy Out Option: A Controlling Shareholder shall have the irrevocable option (herein, the "Buy Out Option"), exercisable at any time during the term of this Agreement, to buy out the Interests of all or any one of the Minority Shareholders pursuant to terms and conditions of this Part 5.
>
> 5.2 […]
>
> (b) for greater certainty, it is expressly understood and agreed that the Buy Out Option shall not constitute an offer that may either be accepted or rejected by the Buy Out Minority Shareholders, but, rather, shall constitute an irrevocable and compulsory option in favour of the Controlling Shareholder exercisable by the Controlling Shareholder at any time in accordance with the provisions of this Part 5.

[9] Part 12 of the 2011 Shareholders' Agreement provides:

> 12.2 Application: This Agreement will apply, without further act or formality, with any necessary changes to any new class, series or numbers of securities to which any Shares may be changed by virtue of any reorganization or recapitalization of the Company, its consolidation, amalgamation or merger into or with another company, or after a consolidation, sub-division or other change in the Shares or capital of the Company.
>
> […]
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> 12.7 Severability: If any provision of this Agreement is unenforceable or invalid for any reason whatsoever, it will be modified rather than voided

> or read restrictively, if possible, to give effect to the interests of the parties to the extent possible, and if not possible, it must be severed. In any event, all other provisions of this Agreement are valid and enforceable to the extent such result is not inequitable.

[10] The respondent, Ms. Anik Gagnon, met Mr. Knutsen and Mr. McDougall in 2012. Following the acquisition of Brian Co. in 2015, Mr. McDougall and Ms. Gagnon became directors of Cobra along with Mr. Knutsen. Ms. Gagnon was not a shareholder of Cobra.

[11] In a March 9, 2015 memorandum to Mr. McDougall (the "Wong Memorandum"), Cobra's corporate solicitor, Mr. Mark Wong, outlined the details for a corporate reorganization of Cobra (the "Corporate Reorganization"). The Wong Memorandum provided:

- Cobra share capital and the composition of the voting shareholders needed to be changed;
- Guarantees by Mr. Knutsen, Mr. McDougall and Ms. Gagnon would replace existing bank guarantees;
- Existing shares of Cobra would be frozen and exchanged for non-voting Class A Preferred shares;
- New investment could be made by parties providing personal guarantees to acquire Class A Common voting shares. Ms. Gagnon intended to have a corporation incorporated for that purpose ("Anik Co.");
- A new shareholders' agreement would be entered into with terms similar to the 2011 Shareholders' Agreement.

[12] At the time, Cobra had three other shareholders including Mr. Kevah Kiamanesh by way of his holding company 0921244 B.C. Ltd. ("Kevah Co.").

[13] Mr. Knutsen, Mr. McDougall and Ms. Gagnon had planned for the Corporate Reorganization to take effect on May 7, 2015 with the general plan being to freeze

the current value of Cobra by exchanging common shares held by the various shareholders for preferred shares of equal value.

[14] Part of the purpose for the Corporate Reorganization was to meet the requirements of s. 86 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), and not trigger any immediate tax consequences.

[15] Had the Corporate Reorganization closed on May 7, 2015 as planned, Mr. Knutsen, Mr. McDougall and Ms. Gagnon would each own 26,000 shares of a total of 83,000 shares, giving each of them 31.32% ownership of Cobra. This did not occur for three reasons.

[16] First, Mr. Kiamanesh did not agree to the Corporate Reorganization. On April 25, 2015, Mr. Knutsen as the majority shareholder, by way of Scott Co., exercised a buyout option of Kevah Co. pursuant to Part 5 of the 2011 Shareholders' Agreement. Litigation followed. It resolved around October 18, 2018 resulting in Kevah Co.'s shares being transferred to Cobra.

[17] Second, Mr. Knutsen was involved in family litigation, which resulted in an order being made on June 17, 2015 restraining him from disposing of family property, including the shares of Cobra owned by Scott Co. This issue was not resolved until July 18, 2019.

[18] Third, given the passage of time since the planning of the Corporate Reorganization, counsel for Cobra, Mr. Wong, advised that an updated valuation of Cobra would be required to ensure the correct freeze value of the shares.

[19] With the Corporate Reorganization failing to close, the shareholdings as found by the judge are as follows:

Scott Co.:	74.73%
Geoff Co.:	21.97%
Richard Wallace:	3.30%
	100.00%

[20] On September 11, 2019, after Mr. Knutsen's family litigation had resolved, he, Mr. McDougall and Ms. Gagnon met to discuss Cobra's future. The relationship between Mr. Knutsen and Mr. McDougall had been deteriorating for several months. During the meeting, it became apparent that the differences had become irreconcilable. This led to Mr. McDougall's employment relationship (through Geoff Co.) being terminated two days later on September 13, 2019. At the time of termination, Mr. McDougall was Cobra's chief operating officer.

The Trial Reasons for Judgment

[21] The judge began by reviewing the legal framework for an oppression claim under s. 227 of the *BCA*:

> [68] Section 227(2) of the *BCA* reads:
>
> (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.
>
> [69] Under s. 227(3) of the *BCA*, the Court has broad powers to make an order with "a view to remedying or bringing to an end the matters complained of …".

[22] The judge then went on to review the principles from *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 [*BCE*]:

> [72] In *BCE Inc*., the Court set forth a two-prong analysis. The Court stated:
>
> [56] […]. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*.
>
> [73] With respect to "reasonable" expectations, the Court, in *BCE Inc.*, stated:

> [62] As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

[23] The judge also correctly stated:

- Wrongful conduct, causation and compensable injury are required in an oppression claim (at para. 75);
- An equitable remedy is focussed on concepts of fairness (at para. 76);
- Shareholders' agreements may be viewed as reflecting the reasonable expectations of the parties (at para. 77); and
- Oppression remedies do not displace the fundamental rule that the duty of directors is a function of business judgment of what is in the best interests of the corporation (at para. 78).

[24] The judge found that no part of the respondents' conduct caused the Corporate Reorganization not to be implemented. The litigation involving Mr. Kiamanesh did not resolve until October 2018 and Mr. Knutsen's family litigation did not resolve until July 2019: at paras. 133, 134, 139.

[25] With respect to Mr. McDougall's termination, the judge found that the business-like relationship between the parties had deteriorated by the time Mr. McDougall was terminated on September 13, 2019, and that it was in Cobra's best interests that Mr. McDougall leave: at paras. 157–158.

[26] The judge found that the meeting between the parties on September 11, 2019 made it abundantly clear that there were irreconcilable differences between Mr. McDougall and Mr. Knutsen. The judge was satisfied that those irreconcilable

differences justified Mr. McDougall's termination and that the decision was made in good faith and with the best interests of Cobra in mind: at paras. 174–175.

On Appeal

[27] Mr. McDougall and Geoff Co. raise a number of grounds of appeal which include that the judge erred in:

i. His analysis of the appellants' reasonable expectations by relying on the 2011 Shareholders Agreement;

ii. Not giving proper effect to the change of circumstances as they existed in 2019 in comparison to the intended Corporate Reorganization;

iii. Not implementing the Corporate Reorganization such that Geoff Co.'s shareholdings as at the date of Mr. McDougall's termination were not increased as contemplated in the reorganization;

iv. Not finding that Mr. McDougall's employment went hand in hand with his shareholdings;

v. Concluding that the appellants had not been oppressed or unfairly prejudiced under s. 227(2) of the *BCA*;

vi. Concluding that it was in Cobra's best interests to terminate Mr. McDougall's employment.

[28] They seek an order that the appeal be allowed and the matter be remitted to the trial judge to make a determination as to the valuation date and value of the Geoff Co. shares pursuant to the Corporate Reorganization.

Standard of Review

[29] As Justice Hunter recently summarized in *Vassilaki v. Vassilakakis*, 2024 BCCA 15:

> [21] Questions of law are reviewable on a standard of correctness. These include issues concerning the interpretation of the *BCA*. A standard of

palpable and overriding error applies to findings of fact and findings of mixed fact and law where a legal principle is not readily extractible: *Housen v. Nikolaisen,* 2002 SCC 33 at paras. 8–12, 36.

[22] In *Khela v. Phoenix Homes Limited,* 2015 BCCA 202, this Court set out the standard of review that applies to a judge's decision whether to grant an oppression remedy under s. 227:

> [37] Whether to grant an oppression remedy under s. 227 is a discretionary decision, and is afforded significant deference on appellate review. This Court may not interfere with the order of the chambers judge dismissing the Khelas' claims unless he acted on a wrong principle, wrongly exercised his discretion by not giving sufficient weight to relevant considerations, or made a decision that results in an injustice: *Goldbelt Mines Inc. (N.P.L.) v. New Beginnings Resources Inc.* (1985), 59 B.C.L.R. 82 at para. 21 (C.A.).
>
> [38] Further, whether conduct amounts to oppression is a question of mixed fact and law. In the absence of an extricable legal error, such a finding is reviewable on the standard of palpable and overriding error: *Stahlke v. Stanfield*, 2010 BCCA 603 at paras. 21, 25; *1216808 Alberta Ltd. (Prairie Bailiff Services) v. Devtex Ltd.*, 2014 ABCA 386 at para. 24.

[23] The chambers judge's finding that the appellants failed to establish a reasonable expectation is a finding of mixed fact and law that should not be overturned absent palpable and overriding error.

Analysis

[30] The appellants challenge the judge's conclusion that they had not been oppressed or unfairly prejudiced on several fronts and I would summarize the appellants' principal grounds of appeal as follows.

(1) The 2011 Shareholders' Agreement

[31] In considering the reasonable expectations of the parties the judge observed that the reorganization, as planned, was the result of Mr. Knutsen, Ms. Gagnon and Mr. McDougall each negotiating at arm's length and acting in their own self-interests: at para. 82. He noted that it was contemplated that there would be a new shareholders' agreement with terms and conditions similar to the 2011 Shareholders' Agreement which "may be viewed as reflecting the reasonable expectations of the parties" which would be updated for, among other matters, the

inclusion of Ms. Gagnon, Anik Co., and the departure of Mr. Sylvester and Brian Co.: at para. 86.

[32] The appellants argue that the judge erred in finding that in the circumstances of this case "a party's expectations must be considered in the context of arm's length dealings of experienced business people with the then Shareholders' Agreement": at para. 88.

[33] They say that the 2011 Shareholders' Agreement was executed in different circumstances than existed as at the date of Mr. McDougall's termination in September 2019. They submit that after 2015, Mr. McDougall's role was to become a decision-maker, guarantee debt and be involved in the management of Cobra and that the 2011 Shareholders' Agreement was no longer in effect after the Corporate Reorganization.

[34] In my view this argument can be summarily dealt with. First, the alleged errors are not ones of law but of mixed fact and law which are subject to the deferential standard of review.

[35] There was also an ample evidentiary basis upon which the judge could conclude that the 2011 Shareholders' Agreement could inform the appellants' expectations which included:

- The Wong Memorandum provided that there was to be a new shareholders agreement and its terms "will be similar to the existing shareholders agreement";

- On cross examination, Mr. McDougall testified that he understood this to be the case. In particular he understood that the 2011 Shareholders' Agreement would apply with any necessary change in the shares or capital of the company arising from the Corporate Reorganization and in the event of the termination of a shareholder the option provisions in the 2011 Shareholders' Agreement would apply;

- The appellants relied on the formula set out in the 2011 Shareholders' Agreement to calculate the value of the shares which Geoff Co. was expected to receive in 2015 as at the time of Mr. McDougall's termination in 2019: at para. 80.

[36] I would not accede to this ground of appeal.

(2) Failure to Implement the Corporate Reorganization

[37] The appellants challenge the judge's finding that the failure of the Corporate Reorganization to close did not give rise to oppression: at para. 140.

[38] They argue that although it was understood between the parties that there was to be a new shareholders' agreement, an agreement on its terms was not central for the ownership structure of Cobra to be altered by the Corporate Reorganization and was not required.

[39] They say that the Corporate Reorganization was performed by the parties in terms of Mr. McDougall and Ms. Gagnon providing bank guarantees, becoming directors of Cobra, and being involved in the company's management decisions, all of which were taken in furtherance of the Corporate Reorganization which the respondents never argued or pleaded was not an enforceable agreement.

[40] In their factum they submit that the trial judge "was not free on his own initiative to make a conclusion in relation to the enforceability of the Reorganization Agreement when none of the parties has pleaded that it was not enforceable". They then state:

> 66. In 2015 the parties agreed to the reorganization. Thereafter they governed themselves according to its terms. All the shareholders reasonably expected the shares to issue when Mr. Knutsen's family law litigation settled. That litigation was resolved in July 2019, some two months prior to Mr. McDougal's termination. Thereafter there were no barriers to the closing of the reorganization. The continuing failure to issues the shares was contrary to the parties' reasonable expectations.

[41] I will briefly comment on the submission that the judge went beyond the pleadings.

[42] I have noted that the appellants' oppression claim was commenced by way of Notice of Civil Claim. The respondents say that in their Amended Response to Civil Claim, they responded to the factual allegations put forward in the Notice of Civil Claim. In relation to the Corporate Reorganization, the appellants plead a series of facts relating to events in 2015 through 2017 and then plead that Cobra "refused or neglected" to issue shares to Geoff Co. The defendants denied that allegation and further plead that "CIS did not immediately issue shares to Gagnon or McDougall owing to, among other reasons, a court order in family litigation enjoining Knutsen from disposing of his assets." Accordingly, they submit that they answered the claims brought against them.

[43] I consider the appellants' submission on this point to be somewhat of a red herring. That is because they have not identified any prejudice that resulted from any alleged deficient pleading and I accept the respondents' submission that the Corporate Reorganization, the fact it had not closed as at the date of Mr. McDougall's termination, and whether this constituted oppressive conduct were all issues on which evidence was led at the trial, were argued by the parties and decided by the trial judge.

[44] The appellants acknowledge that the Corporate Reorganization could not complete until July 2019 when Mr. Knutsen's matrimonial litigation had been resolved.

[45] Accordingly, the judge had to consider whether the appellants had established that the closing of the Corporate Reorganization was within their reasonable expectations as at the time Mr. McDougall was terminated in September 2019.

[46] In finding that the failure of the Corporate Reorganization to close was not oppressive conduct, the judge referred to Mr. McDougall's evidence in cross examination that neither Mr. Knutsen nor Ms. Gagnon had denied that Geoff Co. was a one-third shareholder and that none of the defendants caused the Corporate Reorganization not to be implemented: at paras. 135–139. I take this finding to mean

that the respondents always intended that Geoff Co. would be a one-third shareholder if the Corporate Reorganization completed which, for the reasons identified by the judge, it did not.

[47] There was an ample evidentiary record upon which he could reach this conclusion.

[48] Cobra's corporate solicitor Mr. Mark Wong testified as part of the appellants' case. His evidence described, in part, correspondence he received from counsel for the appellants in October 2021, four months before trial, in which they sought information regarding the reasons the Corporate Reorganization had not closed. Mr. Wong responded that, for the Corporate Reorganization to proceed, it would be necessary:

> … to consider the factual changes that have occurred, to work with its accountants to determine a new value for CIS and to draft new documents to implement a new freeze transaction on a similar basis as was intended to be effective April 30, 2015.

The appellants elicited evidence regarding this letter in their direct examination of Mr. Wong who, in both his direct and cross examination, testified that barriers to implementing the Corporate Reorganization remained after the summer of 2019.

[49] I shall now return to the meeting between Mr. Knutsen and Mr. McDougall which took place on September 11, 2019 which Ms. Gagnon attended by telephone. By this time the relationship between Mr. Knutsen and Mr. McDougall had deteriorated to the point that whether they could continue working together was seriously in question.

[50] Mr. Knutsen testified that at the meeting he advised Mr. McDougall that "we have the ability to issue your shares now. If we issue your shares can we stop this infighting and move on as three partners and build this company like we planned". Mr. McDougall's response was "I have to talk to my lawyers. I can't work with you". Ms. Gagnon corroborated this account in her evidence.

[51] After the meeting, Mr. Knutsen and Ms. Gagnon agreed that in light of what had just occurred, Cobra could not move forward if Mr. McDougall remained involved as director of operations and he was terminated two days later.

[52] Ms. Gagnon also testified that prior to the September 11, 2019 meeting, she had spoken to Mr. Wong who had advised that Cobra's shareholders would have to agree on the value to "refreeze" the shares as at 2019, due to the passage of time since 2015. By this time, she was well aware of the difficulties which had arisen as between Mr. Knutsen and Mr. McDougall. In fact, Mr. McDougall had previously approached her to inquire if between the two of them they could terminate Mr. Knutsen, an avenue which she declined to pursue.

[53] Mr. Wong also testified on cross examination that he was contacted by Mr. Knutsen and Ms. Gagnon in 2021 who inquired whether the Corporate Reorganization could still proceed. He advised them "similar to my earlier response, that you would have to reassess the values and consider what needs to be done". The Corporate Reorganization as planned could not proceed in that "we couldn't have used the 2015 paper"; in other words, the Corporate Reorganization could not proceed as originally contemplated without being updated.

[54] Accordingly, this evidence answers the appellants' argument that the Corporate Reorganization was not conditional on any specific tax treatment issues being addressed.

[55] Since the appellants have not identified a reviewable error I would not accede to this ground of appeal.

(3) The Termination of the Employment Relationship between Cobra and Geoff Co. (Mr. McDougall)

[56] By letter dated September 13, 2019, Cobra advised Geoff Co. that its management services were being terminated immediately. The appellants challenge the judge's finding that the termination did not constitute oppressive conduct and that it was in Cobra's best interests that the relationship end.

[57] With respect to Cobra's best interests the judge found:

- It is uncontroversial that Mr. McDougall was terminated without cause and without notice (at para. 156);
- As of the time of termination on September 13, 2019, Mr. Knutsen and Mr. McDougall's relationship had become irreparably broken (at para. 157);
- As of fall 2018, Mr. Knutsen and Mr. McDougall's relationship was deteriorating (at paras. 159–169);
- From the meeting of September 11, 2019, it had become clear that terminating the employment relationship with Mr. McDougall was in Cobra's best interests (at paras. 170–174).

[58] The appellants also advance a pleadings issue with respect to this ground of appeal. Specifically, they say that the respondents had not pled that the termination was in Cobra's best interests and that the judge erred in his approach to the termination by embarking on a best interests analysis.

[59] I do not agree. The Notice of Civil Claim alleged that the termination was oppressive conduct. Although the Amended Response to Civil Claim did not specifically refer to the termination as being in Cobra's best interests it did identify several reasons for the termination which could only reasonably be interpreted as being in the company's best interests. Furthermore, the issue of the termination being in Cobra's best interests was specifically raised in the evidence of several witnesses. There is no question in my view that whether the termination was in Cobra's best interests was very much a live issue at the trial and the appellants were not prejudiced in any way.

[60] The appellants' substantive arguments which relate to this ground of appeal are that the judge erred in his reasonable expectations analysis by:

- Considering the terms of the 2011 Shareholders' Agreement in his analysis;
- Failing to appreciate that Mr. McDougall's employment was inextricably linked to his shareholdings in the company which with the Corporate Reorganization would place him in a senior management position with the expectation that his shareholdings would increase to being essentially a one-third owner of the company with each of Mr. Knutsen and Ms. Gagnon;
- Finding that a termination without just cause could inform the reasonable expectations analysis.

[61] They also argue that the judge erred in finding that the termination was in Cobra's best interests.

[62] In my view the judge's findings are, once again, amply supported by the evidence.

[63] I reviewed the 2011 Shareholders' Agreement ground of appeal above. It follows that the judge, in my view, was entitled to consider the terms of that agreement as it related to the termination. The judge referred to the relevant provisions in the 2011 Shareholders' Agreement and concluded that the parties agreed that Geoff Co. would be treated as an employee under that agreement: at para. 153.

[64] Mr. McDougall also acted in a way which was consistent with the 2011 Shareholders' Agreement governing the termination of shareholders. He agreed in cross examination that when he became director of operations following the purported Corporate Reorganization in 2015, his predecessor, Brian Sylvester, who was a controlling shareholder through Brian Co., had its services contract

terminated. He also agreed that it was in Cobra's best interests to terminate the service contract at the time since it was in the company's best interests to do so. Simply put, in this litigation, he has adopted a contrary position when it was Geoff Co.'s management services contract that was terminated.

[65] It is also evident from the reasons that the judge carefully considered and was well aware that Mr. McDougall's "employment" was inextricably linked to his shareholdings and that he had acted in accordance with his increased management responsibilities following the Corporate Reorganization.

[66] There was also evidence upon which the judge could ground his analysis and conclusion that the termination was in Cobra's best interests which included:

- The serious deterioration of the relationship between Mr. Knutsen and Mr. McDougall which is explored in some detail in the reasons and included Mr. Knutsen's concerns regarding Mr. McDougall's involvement in the loss of important clients;

- The hostilities which had developed between the two men and included suggestions of physical violence which originated with Mr. McDougall;

- What occurred at the September 11, 2019 meeting as related above and that Mr. McDougall had made it clear he was not interested in working with Mr. Knutsen and Ms. Gagnon to advance the company's business plans.

[67] As the judge observed and then concluded:

> [174] I find that the September 11, 2019 meeting made it clear that there were irreconcilable differences between Mr. Knutsen and Mr. McDougall. After the meeting, Ms. Gagnon concluded that Mr. McDougall's (Geoff Co.'s) employment needed to be terminated. Her thinking was that "otherwise we will never get anything done".
>
> [175] On September 13, 2019, Ms. Gagnon and Mr. Knutsen terminated the employment relationship with Mr. McDougall (Geoff Co.). I find that the decision was made in good faith and in the best interests of Cobra Ltd.: *BCE Inc*. at para. 37.

> [176] As Mr. McDougall acknowledged in cross-examination, Mr. Knutsen had the vision to create products. It made business sense for Ms. Gagnon to side with Mr. Knutsen in the best interests of Cobra Ltd.

(4) Overall Unfairness and the Appellants are Left Without a Remedy

[68] Underlying the appellants' grounds of appeal is that although the claim for breach of the employment contract was allowed with damages of $98,075.00 awarded, Geoff Co. is left without any additional remedy. Since the judge found no oppressive conduct had been established and the Corporate Reorganization did not complete, the claim pursuant to s. 227(3) of the *BCA* was dismissed.

[69] They argue that notwithstanding their efforts from 2015 onwards, they are left in a minority position and unable to benefit from the additional shares that were to be issued following the Corporate Reorganization.

[70] What this argument ignores, respectfully, is that while the appellants may have had a reasonable expectation that the shares in question would be issued, the question becomes whether they established oppressive conduct. Having correctly set out the legal framework and applied it to his careful review of the evidence and his findings of fact, the judge concluded they had not. And for the reasons I have explained, I am of the view no reviewable error has been established.

[71] Without a finding of oppression, the judge could not order Cobra to purchase Geoff Co.'s shares. And since the Corporate Reorganization did not complete, Geoff Co. can be in no better position than Mr. Knutsen or Ms. Gagnon (through their companies) to have the shares issued.

[72] It bears emphasizing that, through no fault of Mr. Knutsen, Mr. McDougall or Ms. Gagnon, it was not until the settlement of Mr. Knutsen's matrimonial litigation in July 2019 that the shares contemplated in the Corporate Reorganization could be issued. By that time, as explained by Mr. Wong, the passage of time meant that what had been contemplated in 2015 had to be updated to ensure the correct freeze value and not give rise to any immediate income tax liability. In other words, the parties had to reach a new agreement as to the value of their respective shares.

[73] It may well be that this process would have been straightforward but for the irreconcilable differences which had arisen by September 2019 between Mr. Knutsen and Mr. McDougall. Notwithstanding Mr. Knutsen's invitation "that we stop this infighting and move on… and build this company like we planned", Mr. McDougall's response was "I have to talk to my lawyers. I can't work with you". Mr. Knutsen and Ms. Gagnon then decided that it was in Cobra's best interests to terminate the relationship with Mr. McDougall.

[74] While it may be regrettable that these differences arose, the judge found that the respondents were not responsible and no oppressive conduct had been established. In light of his findings and conclusions, all the judge could do was to then state:

> [194] With the failure of the Corporate Reorganization to close, Geoff Co.'s shareholdings in the capital of Cobra Ltd. consist of 5,000 Class B common shares and 5,000 Class C common shares.

[75] Geoff Co. remains a shareholder in Cobra and it will be for it to decide what avenues it wishes to pursue.

[76] Since no reviewable error has been identified I would not accede to this ground of appeal.

Conclusion

[77] As the Court stated in *BCE:*

> [95] As discussed above (at para. 68), in assessing a claim for oppression a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[78] The trial judge properly answered “no” to both questions.

[79] I would dismiss the appeal.

“The Honourable Mr. Justice Abrioux”

I AGREE:

“The Honourable Justice Griffin”

I AGREE:

“The Honourable Justice Skolrood”