CITATION: Unique Broadband Systems, Inc. (Re), 2013 ONSC 2953
COURT FILE NO.: CV-11-9283-00CL
DATE: 20130521

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

IN THE MATTER OF *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS, INC.

BEFORE: MESBUR J.

COUNSEL: *Joseph Groia and Gavin Smyth*, for Jolian Investments Limited and Gerald McGoey

Clifford Cole, Benjamin Na and Joe Thorne for Unique Broadband Systems, Inc.

HEARD: February 19-22, 25-28 and March 1, 2013

REASONS FOR DECISION

Overview:

[1] This case raises, yet again, the question of when a court may interfere with decisions a corporation's board of directors has taken which the Board says were made in the exercise of the board's "business judgment".

[2] Here, the corporation Unique Broadband Systems, Inc. (UBS) alleges certain decisions in relation to executive compensation made by its former board, and particularly its former Chief Executive Officer and Chairman, Gerald McGoey, were made in breach of both his and the board's fiduciary obligations to the corporation and should be set aside. Mr. McGoey takes the position the decisions were a proper exercise of his and the board's business judgment. He seeks payment of the compensation and other amounts he says are due to him from UBS.

[3] Gerald McGoey has enjoyed a forty-five year career serving in senior management positions and on the boards of directors of a number of Canadian public companies.

[4] Unique Broadband Systems, Inc. (UBS) is a public company listed on the TSX Venture Exchange. In 2001 a dissident group of shareholders formed with a view to ousting the members of the UBS board and replacing them with its own slate of directors. In 2002 the dissident group approached Mr. McGoey and invited him to join the slate of potential new directors. He agreed. The old board was removed, and Mr. McGoey was elected to the UBS board. He also became UBS' acting Chief Executive Officer while the company looked for someone to take on the position on a permanent basis.

[5] The UBS board asked Mr. McGoey on several occasions to become the permanent CEO. He repeatedly declined. UBS persisted. Eventually, Mr. McGoey was able to negotiate what he viewed as an acceptable employment contract, and agreed to become CEO under its the terms. The employment agreement provided significant "golden parachute" benefits to Mr. McGoey in certain circumstances. Eventually, a very similar Management Services Agreement between UBS and Mr. McGoey's personal company, Jolian Investments Limited replaced the employment contract. Through the Jolian Management Services Agreement, Jolian agreed to provide Mr. McGoey's services to UBS. I will refer to Mr. McGoey and Jolian collectively as Mr. McGoey.

[6] Sometime in 2003, UBS acquired a 51.8% controlling interest in a telecommunications company called Look Communications. Mr. McGoey then became the vice-chairman and CEO of Look. UBS provided Mr. McGoey's services as CEO to Look through another Management Services Agreement. The UBS/Look Management Services Agreement required Look to pay UBS an annual fee of $2.4 million for Mr. McGoey's services.

[7] Look's major significant asset was a band of telecommunications spectrum. Mr. McGoey was instrumental in negotiating the sale of that spectrum to a company called Inukshuk, a consortium of Bell and Rogers, two of Canada's telecommunications giants. The sale was for $80 million, a sum Mr. McGoey found very disappointing.

[8] Mr. McGoey then began to negotiate with Rogers for the sale of Look's remaining assets to Rogers. No deal came to fruition. At the same time, Mr. McGoey and the Board of UBS changed some of the share incentive plans and stock option benefits for senior management and directors, including Mr. McGoey. The board also declared a very large bonus for Mr. McGoey. These changes had the result of providing Mr. McGoey with significantly increased special awards, enhancing the potential value of Mr. McGoey's golden parachute from UBS.

[9] Primarily as a result of these changes, a disgruntled group of dissident shareholders launched another battle in late 2009 to remove Mr. McGoey and the rest of the board. They succeeded. A new board replaced Mr. McGoey, along with the rest of the members of the UBS board. Mr. McGoey then sued UBS for payment of the financial benefits he says he is entitled to pursuant to his contractual relationship with

UBS through the Jolian Management Services Agreement. Mr. McGoey brought a motion for summary judgment in that action for reimbursement and indemnification in relation to professional fees, which were part of these contractual entitlements. He was successful on that motion and obtained summary judgment from Marrocco J. The judgment is subject, however, to any findings of misfeasance against Mr. McGoey that might be made in this trial.

[10] UBS appealed the Marrocco J judgment, but has abandoned its appeal. Instead, it has sought protection in this proceeding under the *Companies' Creditors Arrangement Act,* (*CCAA*). As a result, Mr. McGoey's lawsuit against UBS has been stayed.

[11] As is customary in *CCAA* proceedings the court established a claims determination process. Among other things, the claims determination process directs that Mr. McGoey's claims against UBS in his earlier, now stayed, lawsuit be determined in the claims process instead. As a result, Mr. McGoey submitted three proofs of claim against UBS totalling roughly $9.5 million. The Monitor, together with the board of UBS has denied the claims. Mr. McGoey seeks to reverse those denials, and to have his claims, as amended, approved. The court directed that this issue be tried. This is that trial.

The parties' positions:

[12] UBS takes the position Mr. McGoey is entitled to nothing. It says he breached his fiduciary duties as a director of UBS and failed in his obligations to the shareholders of UBS when certain share appreciation rights were cancelled and replaced with significantly enhanced benefits for Mr. McGoey, along with a very large bonus for him. UBS says they are excessive. UBS says Mr. McGoey preferred his own interests over those of UBS and its shareholders when these enhanced benefits were created. It says in doing so, Mr. McGoey breached his duties to the corporation. UBS also suggests that the result of these enhanced benefits is oppressive to the interests of UBS and should be set aside on that basis as well.

[13] To the contrary, Mr. McGoey says the decisions taken by the UBS board were business decisions guided by the board's business judgment. He says as a result the court should not second guess that business judgment and should decline to interfere with the board's decisions. He says that under the terms of his contractual entitlements, he was terminated without cause, and is therefore entitled to the "golden parachute", calculated in accordance with the enhanced benefits awarded to him. He therefore submits that his claims, as amended, should be accepted and confirmed.

[14] Mr. McGoey has now amended his claims to reduce the amount he claims from about $9.5 million to just over $5.8 million. He also seeks to enforce Marrocco J's judgment for reimbursement and indemnification.

Factual findings:

[15] Many of the facts are not in dispute. The essence of the case is whether I accept Mr. McGoey's evidence that the board's decisions reflected a reasonable and rational application of the board's business judgment, or whether I accept UBS' position that Mr. McGoey's actions as director and chairman of the board breached his fiduciary obligations to UBS and to its shareholders.

[16] In all, I heard from only four witnesses over the nine days of trial. Mr. McGoey was the only witness for himself and Jolian as claimants. He testified for five days. UBS called evidence from David McCarthy, a lawyer at Stikeman Elliott, Michael Kavanagh, an accountant at KPMG, and Michael Thompson, an expert in the field of executive compensation. Neither side called any other board member or executive from UBS who served at the time of critical events in this case. I heard nothing from any other member of the compensation committee at UBS. I will have more to say about this in due course.

Mr. McGoey joins the UBS dissident board slate

[17] Sometime in late 2001 or early 2002, the law firm Heenan Blaikie approached Mr. McGoey to see if he would stand as part of a dissident Board slate proposed by UBS' largest shareholder and founder. Mr. McGoey agreed. In March 2002 UBS held a special shareholders' meeting at which shareholders elected a new board. Mr. McGoey was elected to the board at this meeting.

[18] After the UBS board was replaced, the entire management team resigned. It was after this occurred, the new board asked Mr. McGoey to become the interim acting CEO of UBS. Mr. McGoey agreed, expecting the board would search for a permanent replacement in the meantime.

[19] Once he took on the position of acting CEO, Mr. McGoey learned that UBS had been steadily losing money. Even though the company had large cash reserves, it did not have any reliable revenue stream.

[20] Although the board continued to search for a full time CEO, its efforts were unsuccessful. On a number of occasions, the board offered the position to Mr. McGoey, but he declined. Nevertheless, in his position of acting CEO, he continued to operate the company.

[21] The board persisted in its efforts to have Mr. McGoey become permanent CEO. He agreed, subject to his negotiating an acceptable employment agreement with UBS.

Mr. McGoey's employment agreement with UBS.

[22] The process leading up to Mr. McGoey's employment agreement with UBS included the board retaining the services of Mercer and Co. and particularly their executive compensation experts to advise on a reasonable level of compensation for someone of Mr. McGoey's experience and expertise. Mr. McGoey negotiated with the board's Human Resources Committee, which dealt with questions of executive compensation. Both sides had counsel. Although Mercers recommended a particular range of compensation, Mr. McGoey was able to negotiate a far richer package than what Mercers said was the expected range. In fact, his eventual contract provided nearly double the amounts Mercers had recommended.

[23] From Mr. McGoey's point of view, any employment contract would have to provide substantial indemnity for himself as both a CEO and director. Because of the history of the previous board having being ousted, and the acrimony surrounding that process, Mr. McGoey did not want to face paying significant legal costs if history repeated itself. The whole issue of termination, and protection in the event of termination was very important to him.

[24] Mr. McGoey did not accept the first offer UBS made to him. As he put it, he was not prepared to take on the position of CEO for the compensation they were proposing. Negotiations continued.

[25] On the issue of termination, Mr. McGoey testified that he was firm that it would only be in the event of fraud that he would be disentitled to receive the compensation set out in any employment agreement.

[26] After a month or two of negotiations, UBS and Mr. McGoey finally reached agreement effective June 2, 2002 on the terms of his employment agreement. The highlights of the agreement were:

a) Mr. McGoey's annual compensation was set at $360,000 US. The company could also pay Mr. McGoey an annual bonus, in the company's discretion;

b) Mr. McGoey was granted 3,000,000 initial stock options at a strike price of $0.48;

c) The initial options were to vest in tranches of 1,000,000 shares when the trading price of the shares reached certain levels. In the case of the first 1 million shares, the level was at 125% of the strike price. In the case of the second million shares, the level was at 150% of the strike price, and in the case of the last tranche of shares, the level was at 200% of

the strike price. There were certain deferrals relating to the exercise of the options.

d) UBS also agreed to grant Mr. McGoey subsequent options totalling 2 million shares. The first million were to be granted June 1, 2003 and the second million a year following. These subsequent options vested one third each on the first three anniversary dates following the grant.

e) Mr. McGoey would receive the highest level of insurance coverage available for health, medical, dental and the like, as well as payment for the four clubs he belonged to, and reimbursement of his vehicle expenses.

[27] The agreement also had the following provision in article 3.3.5 concerning the company reimbursing Mr. McGoey for legal expenses. The provision reads:

> **Legal Expenses** - Without limiting the generality of Section 3.3.3, the Company will reimburse the Executive for all reasonable legal expenses incurred in respect of this Agreement, the Executive's performance of the Services as contemplated herein and any other matter relating to the Company including the defence against actions commenced by regulatory authorities. Notwithstanding any other provision of this Agreement, the Company shall not reimburse the Executive for legal expenses incurred in respect of a matter
>
> a) in which Cause has been established, and
>
> b) arising out of dealings involving the Executive as a private shareholder.

[28] "Cause" is defined in the Agreement as "fraud, embezzlement, or misappropriation or other act which constitutes 'Cause' at common law, and, in each case, which is materially injurious to the Company."

[29] The employment agreement goes on to make specific provision for benefits to be paid to Mr. McGoey on termination or resignation. These are set out in Article 5 of the agreement.

[30] First, if UBS terminates Mr. McGoey for cause, (as defined), it is only obliged to pay him whatever base salary is due at the date of termination, together with a *pro rata* share of any annual bonus actually awarded at the time of termination. In addition, the company must also pay any amounts owing in relation to Mr. McGoey's

benefits and vacation entitlements. If Mr. McGoey resigns, his entitlements are the same as if he were terminated for cause.

[31] The amounts payable on termination otherwise are quite different. They create what is often called a "golden parachute". Article 5.3 sets out these entitlements. Article 5.3.1 reads:

> **5.3.1. Entitlement** - The Company may terminate this Agreement at any time without Cause or upon the Disability or death of the Executive and the Executive may terminate this Agreement for Good Reason following a Change-in-Control, in which event, the Executive shall be entitled to a lump sum payment equal to three hundred percent (300%) of the aggregate of:
>
> a) the Executive's Base Salary;
>
> b) a bonus equal to the greater of:
>
> (i) the bonus paid in the immediately preceding fiscal year;
>
> (ii) the bonus paid in the immediately preceding calendar year;
>
> (iii) the average of the bonuses paid in the two immediately preceding fiscal years; or
>
> (v) the average of the bonuses paid in the two immediately preceding calendar years;
>
> c) amounts due and owing pursuant to Section 3.3 and Section 3.6 at the time of termination; and
>
> d) 50% of the Options not yet granted to which the Executive would have been entitled had he completing the remaining Term.
>
> The failure of the shareholders of the Company to re-elect the Executive to the Board or the failure of the Board to nominate the Executive for the positions of Executive Chair and Chief Executive Officer shall constitute a "termination without Cause" for the purposes of this Agreement.

[32] The agreement goes on to provide that any payment due to Mr. McGoey on termination must be paid in a lump sum within five business days of the termination.

[33] In May of 2006 Mr. McGoey's employment agreement with UBS was replaced with a Management Services Agreement between Mr. McGoey's personal company, Jolian Investments Limited and UBS. Under the terms of the Jolian Management Services Agreement, Jolian agreed to provide Mr. McGoey's services as CEO to UBS. Mr. McGoey was described as the "CEO designee" in the Jolian Management Services Agreement.

[34] To a large degree, the terms of the Jolian Management Services Agreement mirror those of the original employment agreement. For example, the base fee UBS was to pay Jolian was $360,000, the same as the base salary UBS had paid Mr. McGoey under his employment agreement. By mid May 2007, this figure had risen to $570,000.

[35] Some differences between the employment agreement and Jolian Management Services Agreement include the following:

a) Instead of providing for specific grants of stock options, the Jolian Management Services Agreement left it to the Board's discretion to recognize Jolian's performance by applying performance criteria the Board deemed appropriate. This could take the form of cash bonus payments, the direct grant from Treasury of company shares or options for the purchase of company shares from Treasury;

b) Mr. McGoey would not participate in the UBS employee benefits plan;

c) Jolian, not UBS, would make all necessary tax remittances on Mr. McGoey's behalf;

[36] UBS could terminate the agreement because of a "Jolian default", and would be under no obligation to pay anything more than whatever base salary is due at the date of termination, together with a *pro rata* share of any annual bonus actually awarded at the time of termination. In addition, the company must also pay any amounts owing in relation to Mr. McGoey's benefits and vacation entitlements. If Mr. McGoey resigns, his entitlements are the same as if he were terminated for cause.

[37] "Jolian default" is a defined term. It means:

a) An act of fraud, theft or misappropriation or other act which constitutes "Cause" at common law committed by the CEO designee; and

b) The material failure by the CEO designee to perform the CEO services after having received written notice of such material failure and been given reasonable time to correct same;

in each case, which is materially injurious to UBS or has not been waived by UBS.

[38] The Jolian Management Services Agreement also included a term that expanded the definition of "termination without Cause" to include the failure of the shareholders of the company to re-elect the CEO Designee to the Board, or the failure of the Board to nominate the CEO Designee for the position of Executive Chairman of UBS. This echoed the wording and spirit of article 5.3.1 of the original employment agreement.

[39] The Jolian Management Services Agreement, like the employment agreement, had broad indemnification provisions. As Mr. McGoey testified, this was a very important feature for him.

[40] Unlike Mr. McGoey's employment agreement with UBS, there was no outside consultant involved when UBS entered into the Jolian Management Services Agreement. Although UBS and Jolian entered into the Jolian Management Services Agreement in 2006, its terms were not disclosed to the UBS shareholders until nearly the end of May 2010 when it was filed on SEDAR.

Early days at UBS

[41] Mr. McGoey testified that his early days at UBS were spent trying to find a reliable revenue stream for the company and reducing expenses. This included trying to solve the problem of the large number of engineers UBS was employing, without any future stream of work to keep them busy. His initial focus was on limiting losses and streamlining operations. With that in mind, he was able to negotiate with the engineering employees to spin off a separate company that they would own and control.

UBS acquires control of Look

[42] In his search for investment opportunities for UBS, Mr. McGoey began to look at entering into the wireless spectrum business. Telesystems and Bell Canada had formed a company called Look Communications. Look had acquired a broadcast licence for nearly 100 MHz of wireless spectrum. Because there was a falling out between the principals of the Look shareholders, UBS was able to acquire the Telesystems interest in Look. In 2003 Mr. McGoey was able to negotiate UBS' acquiring a controlling position in Look. He was pleased to have done so without involving an investment banker or paying related fees.

[43] Look wanted Mr. McGoey on its board and management team as well. In May of 2004 Look and UBS negotiated a Management Services Agreement under which UBS provided Mr. McGoey's services to Look as vice chairman and CEO of Look. Look paid UBS an annual fee of $2.4 million under this Management Services Agreement for Mr. McGoey's services.

[44] Look and UBS (as majority shareholder in Look) became one of the largest owners of broadcast spectrum in Canada. The spectrum was a valuable asset. The issue was how to unlock its value. Although Look tried to raise capital to exploit the asset itself, it was unsuccessful. The question then became how to sell the spectrum at maximum value.

Selling the Look spectrum

[45] Mr. McGoey knew Look's spectrum was extremely valuable. Selling the spectrum would create value for both Look and UBS. The issue was how to maximize that value, particularly as a small player against giants like Rogers, Bell, Shaw and Telus in the highly competitive telecommunications industry. Mr. McGoey was anxious to create a bidding process for the spectrum that would bring these large bidders to the table, bid against each other, drive up the price for the spectrum and maximize its value.

[46] Mr. McGoey consulted with a law firm, Thornton Grout, with a view to creating a plan. What emerged was a suggestion to accomplish the spectrum sale through a statutory plan of arrangement. They carried out this plan in 2009.

The plan of arrangement

[47] Since Look's potential sale of its spectrum constituted a sale of substantially all its assets, such a sale would fall into the definition of an "arrangement" under the governing business corporations legislation. Putting the plan of arrangement to the shareholders for approval, and having the entire process supervised by the court would, Mr. McGoey hoped, create an auction process with many bidders vying to purchase the spectrum. He told shareholders that a plan of arrangement would maximize shareholder value and offer shareholders confidence that a fair process was being followed. In using the plan of arrangement procedure, shareholders were not initially being asked to approve the transaction itself. Instead, the court would approve a process whereby shareholders would be asked to approve the company's going to the market to sell the assets. Once a potential agreement of purchase and sale was obtained, it would go to shareholders for final approval and ultimately for court approval.

[48] The plan of arrangement went forward, with a court approved process for an auction of Look's spectrum. On February 16, 2009 bids were received and opened.

There was only one bid. Inukshuk Wireless Partnership (a partnership of Bell and Rogers) made a bid for $80 million. Mr. McGoey had expected significantly more. It was a crushing disappointment. Nevertheless, the sale went to the shareholders and then to court. On May 14, 2009 the court made its final approval order, approving the sale of Look's spectrum to Inukshuk.

Terms of the Inukshuk deal

[49] The Inukshuk deal was not simple. Telecommunications spectrum is not an ordinary commodity. Use of telecommunications spectrum is subject to strict regulatory oversight and approval. In addition to being subject to regulatory approval, the deal contained numerous additional terms and conditions, with the proceeds payable in up to three installments with an outside closing date of May 2012. It was also subject to settling outstanding litigation between UBS and Rogers, and between Look and Bell Canada.

[50] The transaction included the following terms:

a) Inukshuk would buy Look's spectrum for $80 million;

b) Look and Bell would release each other from their existing outstanding litigation. Look would pay Bell $16 million to settle the lawsuit;

c) UBS and Rogers would settle UBS' outstanding $160 million claim against Rogers for $4 million.

[51] Inukshuk was to pay the $80 million by way of a payment schedule. First, a $30 million non-refundable deposit was due on court approval. This occurred on May 14, 2009. A second non-refundable deposit of $20 million was to be paid no later than December 31, 2009. The last payment of $30 million was due no later than the earlier of regulatory approval or 36 months from the closing upon court approval. Look would not actually transfer the spectrum to Inukshuk until it had paid the entire $80 million.

[52] Mr. McGoey testified the regulatory approval process could be extremely slow. What this meant was that the final closing could take up to three years from the first payment. During this time, Look had to continue to operate to ensure no material adverse conditions arose. Mr. McGoey testified that the process was fraught, and there was no guarantee the deal would finally close. Surprisingly, conditions were met earlier than anticipated and Inukshuk made the final payment on September 11, 2009.

[53] Because Look had to continue to operate, Mr. McGoey said it was important to retain key personnel and avoid potential termination problems. It was during this period of May to September that Look's compensation committee and board

considered the issue of whether to make bonus and equity cancellation payments to some personnel. The UBS compensation committee and board began to consider the same issue, as well.

[54] Both Look and UBS management expected share prices of both companies to rise as a result of the Inukshuk sale. They anticipated a reasonable share price of somewhere between 30 cents and 50 cents. It did not happen.

Trying to sell remaining Look assets

[55] Once the Inukshuk deal closed, Look was left with its remaining assets or shares to sell. These assets included roughly $300 million in tax losses and similar assets, some subscribers and some real estate. Beginning in May 2009 after court approval of the Inukshuk deal, Mr. McGoey was involved in ongoing negotiations with Rogers, trying to sell Look's remaining assets or UBS' Look shares to them. The goal was to maximize the value of those assets for Look's shareholders, including its majority shareholder UBS.

[56] Mr. McGoey testified that he had negotiated the essence of a deal, in which Rogers would acquire the Look shares UBS owned for $76 million, or 40 cents per share. Rogers apparently wanted all of Look's employees to stay on after Rogers acquired the shares and continue to work with Rogers. Rogers did not want to end up paying severance to the employees.

[57] Negotiations were not easy. By July 8, 2009 they were going badly, with Rogers "grinding" on the price, as Mr. McGoey put it. Mr. McGoey knew that Rogers wanted to drop the price or reverse compensation. Although Mr. McGoey said the lawyers were drafting documents, Rogers withdrew from negotiations on July 20, 2009.

[58] Although there was no term sheet or agreement of purchase and sale actually executed, (or even drafted) I am nevertheless persuaded negotiations went to the stage Mr. McGoey described. That said, the deal, such as it was, was completely off the table by July 20. After that, there were no meaningful negotiations with anyone else to acquire either the balance of Look's assets, or UBS' controlling shareholding in Look at 40 cents or any other value. By this time, the value of Look's and UBS' shares remained low.

[59] Nevertheless, the discussions about changes to executive compensation at both Look and UBS continued. These included considering the likely cost to both companies on a triggering event under their Share Appreciation Rights Plans.

The SARs plan

[60] In November of 2006 UBS had established what is known as a Share Appreciation Rights Plan, or SARs plan.

[61] SARs are similar in many ways to stock options, since their value is tied to the value of the shares of the corporation. SAR plans are a type of incentive plan that provides the participant with an opportunity to earn an award based on an increase in share value. Unlike stock options, instead of buying the shares, the executive is given a cash award equal to the appreciation in the share value over the value of the unit when awarded. Conditions are attached to the awards. When those conditions are met, payment is triggered and the company must pay the unit holder the value of the units, as determined under the plan.

[62] The UBS SARs plan was described to shareholders as being for the purpose of attracting and retaining people to serve as directors, officers and employees of the company, or to offer consulting services to the company, and to promote a greater alignment of interest between such directors, officers, employees and consultants and the shareholders of the company.[1] The "value" of SARs units were described as "the average closing board lot sale price of the Common Shares of the Corporation on the TSX Venture Exchange on the last preceding day on which the Common Shares were traded."[2] The SARs plan itself does not define the conditions under which unit holders will be paid the value of their units. A directors' resolution, passed at the same time the SARs plan was established sets out various "satisfaction dates" when the unit holders must be paid the value of their SARs units. This includes a date that "the Corporation sells all or substantially all of its assets." There are other satisfaction dates listed, but no others are germane to the discussion here.

[63] The UBS SARs plan also provides that the plan can be amended or terminated at any time at the Company's sole discretion.[3] Mr. McGoey confirmed that between the years 2004 to 2008, Management Information Circulars (MICs) set out the methodology of valuing the units as market price less exercise price. This is what shareholders were told. There was no suggestion of valuing them in any other way.

The compensation committee and the board consider changes to the SAR plan

[64] After the court approved the Inukshuk sale on May 14, 2009 Mr. McGoey described management at UBS and Look beginning to deal with SARs and options as

---

[1] Management Information Circular for the shareholders' meeting of February 27, 2007. The purpose of the SARs plan is also described in this way in the Plan itself.
[2] Article 2, UBS Share Appreciation Rights Plan, approved by the Board October 12, 2006
[3] *Ibid,* Article 15

part of the restructuring he said would be required by either the Inukshuk transaction or a sale of UBS' interest in Look to Rogers.

[65] The Inukshuk sale was considered a sale of all or substantially all of Look's assets, since the spectrum made up the bulk of its assets. Similarly, the sale could be considered in the same way at UBS, since by it, Look, which was UBS' only real asset, sold its most valuable asset. If the Rogers sale went through, then UBS would sell its only remaining asset outright, namely its shares in Look. SARs payments would be triggered under the SARs plan when the final payment was made under the Inukshuk deal. The board, in its discretion, could also decide payments under the UBS SAR plan would be triggered on the same basis as the Look plan. It did so.

[66] The UBS compensation committee had the task of looking at the SARs plan and other enhancements. The Look compensation committee did the same thing.

[67] The Look compensation committee was made up of Mr. Smith, Mr. Colbrand, Mr. Cytrynbaum, Mr. McGoey and Mr. Mitrovitch. All were also members of Look's board. Initially the Look compensation committee recommended to the board that the SARs should be triggered on the date of the final approval order, namely May 14. Second, they recommended the value of the SARs should be calculated on the average trading value of Look stock the day before that. Last, the committee recommended that the SAR benefits should be paid out only when Look received the second payment of $20 million. They discussed paying interest from the trigger dat to the payment date. This initial recommendation made no changes to the SAR plan itself; it simply determined the triggering event and payment date.

[68] The UBS compensation committee was made up of Mr. McGoey, Chairman of the Board and CEO, together with board members Mr. Mitrovitch and Mr. Minaki. Each of them had a considerable number of UBS SAR units. Mr. McGoey, through Jolian, had 3,000,000, Mr. Mitrovitch had 1,500,000 and Mr. Minaki had 1,650,000.

[69] Initially, a recommendation was made to the UBS board simply to trigger the SAR payments on court approval of the Inukshuk transaction. This was similar to the initial recommendation that had been made to the Look board. The payments would simply be based on the formula set out in the SAR plan itself, and described in MICs to shareholders as the difference between the unit price and the trading price the day before the trigger date. While it was unclear whether the Inukshuk sale would automatically trigger payment under the UBS SARs plan, the plan permitted the board to make that decision, which it did.

[70] Mr. McGoey said the compensation committee considered a number of potential SARs payouts on the triggering date, based on various potential share prices. If the shares were trading at 30 cents, the payout would be $4 million. If it was 40 cents, it would be $8 million. Finally, if the shares were trading at 50 cents, the payout

would be $11 million. In early May, however, share prices were nowhere near these levels. Look's were trading at 20 cents, and UBS' at 15 cents.

[71] UBS issued a press release on May 11, 2009 stating that the Inukshuk agreement had yielded a fully diluted price per share result of 44 cents and a fully diluted (including options) price per share of 42 cents. These figures were calculated simply by dividing the total purchase price of $80 million by the number of outstanding Look shares. They did not represent any actual valuation of the companies. They did not account for any expenses of the sale, or compensation payments made as a result of the sale.

[72] Later, UBS' compensation committee came up with a plan to cancel the SARs plan and replace it with a fixed compensation payment to SAR holders whereby they would be paid 40 cents per SAR unit. In all, there were five people at UBS who would receive the fixed compensation, namely four members of the board (including the three members who made up the compensation committee) and Mr. Dolgonos, an IT consultant.

[73] The issue of executive compensation was on the agenda for the UBS Board meeting of June 17, 2009. Before the meeting, Mr. McGoey raised a question about board approval of executive bonuses with David McCarthy, UBS counsel. Mr. McCarthy sent an email to Mr. McGoey on July 10, 2009 regarding what he described as "National Policy 58-201-Corporate Governance Guidelines." He wrote, in part:

> I am writing in response to your question relating to board approval of executive bonuses ... Specifically I understand that one of the directors made reference to section 3.15 of National Policy 58-201 dealing with Corporate Governance Guidelines. Section 3.15 says that the board should appoint a compensation committee 'entirely of independent directors'

[74] Mr. McCarthy stated this was simply a guideline for public companies, and was not a requirement either pursuant to securities law or TSX Rules. He noted that the policy specifically states "that it is NOT to be prescriptive and that issuers are 'encourage[d] ... to consider the guidelines in developing their own corporate governance practices'".

[75] Mr. McGoey also asked Mr. McCarthy to provide the UBS board with a letter outlining the board's authority to make payments to officers and employees and its duties and obligations in doing so. Mr. McCarthy wrote to the board on June 17, 2009. In his letter he outlined the board's power and authority to make such payments, including special payments, to officers and employees of a corporation. He emphasized, however, that in doing so the board members would have to continue to meet their fiduciary obligations.

[76] Mr. McCarthy's letter went on to describe directors' fiduciary duties as "a duty to act in the best interests of the corporation." This included the requirements to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[77] Mr. McCarthy's letter then referred to the Supreme Court of Canada's decision in *BCE Inc. v 1976 Debentureholders* [4] and pointed out that directors, acting in the best interests of a corporation "should consider the interests of shareholders, employees, creditors, consumers, government and the environment." He said, however, that "deference will be given to directors' decisions under the 'business judgment rule' so long as those decisions fall within 'a range of reasonable alternatives'".

[78] Mr. McCarthy concluded his comments on this issue by saying that a board has the power and authority to make payments to officers, employees and directors as long as in doing so it is acting in the best interests of the corporation, looking to the interests of shareholders, employees, creditors, consumers, governments and the environment. He pointed out that in situations involving a restructuring or winding down of a corporation it is common for a board to authorize special payments to officer, employees and directors "to incentivize such individuals to remain with the corporation if the board decides it is in the best interests of the corporation to retain these individuals."

[79] The UBS board considered the issue of the SAR plan at its meeting on June 17, 2009. It had Mr. McCarthy's letter on hand for the meeting. Mr. McCarthy was also present for a portion of that board meeting. He was not, however, asked to opine on the decisions the board took.

[80] The minutes of the June 17, 2009 board meeting report the following in relation to discussions about these issues:

> C. Restructuring Plans
>
> 1. Look
>
> Look's Management presented to the Board the restructuring plans for Look and the likely impact of the spectrum transaction on the interim financial statements for Quarter 3, 2009

---

[4] 2008 S.C.C. 69 (*BCE Inc.*)

2. UBS

UBS' Management presented the likely impact of the spectrum transaction and the Inukshuk litigation settlement on the Quarter 3, 2009 interim consolidated financial statements and the impact of the transaction on UBS' outstanding Share Appreciation Rights ("SAR") Units and stock options.

[81] Each director then disclosed his conflict of interest regarding his SARs unit holdings, after which the directors unanimously passed a resolution[5] which, among other things, stated the following:

a) As a result of the Corporation's sale of its operating assets and the restructuring of Look's business, all outstanding SAR Units, totalling 11,300,000 would be cancelled as of May 31, 2009;

b) SAR Cancellation Payments would be awarded with payment, including interest, conditional upon Look receiving the full consideration of $80 million pursuant to the Look Agreement of Purchase and Sale and UBS receiving adequate cash resources;

c) A SAR cancellation Payouts Pool of $2,310,000 as per Appendix B[6] is approved for allocation to SAR Holders at a future date;

d) SAR holders would be requested to relinquish all rights to any and all SAR Units awarded to them as of May 31, 2009;

e) SAR holders would receive a SAR Cancellation Opportunity Payout, being a 'top-up' payment if a Look share transaction was concluded at above $0.40 per share in the following twelve months;

f) Full and final releases would be obtained from all SAR holders; and

g) Any officer or director of the Corporation is hereby authorized and directed to do such things and take such actions as may be required to give effect to the forgoing.

---

[5] Minutes of UBS Board meeting of June 17, 2009

[6] Appendix B is simply the same list of items as appears in the Minutes

[82] The UBS board also considered bonuses for certain personnel. Not long after it approved the cancellation of the SAR plan, the UBS board established what was called a "bonus pool" of $3.4 million after a two day board meeting on July 8 and 9. Mr. McGoey had proposed a bonus pool of $7 million to the board, but this was reduced to the $3.4 million figure after the meetings of July 8 and 9. This pool was described as a "retention and bonus pool".

[83] Both the SAR cancellation pool and retention and bonus pool were allocated at a board meetng of August 28, 2009. As a result of the allocation, Mr. McGoey was allocated just over $600,000 on account of his cancelled SAR units. They were described as being conditional upon Look receiving the full consideration of $80 million. In fact, this occurred about two weeks later, in early September. As to the deferred bonus pool, Mr. McGoey through Jolian was allocated $1.2 million of the $3.4 million bonus pool. Jolian's share of the bonus pool was described as a "deferred bonus award". Up to this point, the largest bonus Mr. McGoey had ever received from UBS through Jolian was about $440,000.

[84] On September 8, 2009 the chair of the compensation committee advised Jolian that the deferred bonus award would be paid on the earlier of the following conditions:

a) Adequate cash resources being received by the Company;

b) The termination of the Jolian Management Services Agreement;

c) A change in control of the Company; and

d) At the discretion of the Board of Directors.

[85] The award would accrue compounded monthly interest at the Bank of Nova Scotia's prime rate. Interest would be paid at the same time as the bonus was paid. The result of these changes was that Mr. McGoey's SARs entitlement changed from $300,000 to $600,000, in addition to which he was awarded a "bonus payment" of $1.2 million.[7]

[86] Look received the final payment on the Inukshuk deal just three days after this letter was sent to Mr. McGoey.

---

[7] There were similar SARs cancellations and bonus and retention awards at the Look level, which UBS funded indirectly to the extent of 51.8% as a result of its interest in Look. I will not analyze the details of the Look benefits, which arose in a similar manner to those awarded at UBS.

[87] As I have mentioned, Mr. McGoey was a member of the UBS compensation committee. It was this committee that made the recommendations to the board about both cancelling the SAR units, and setting up a bonus pool.

[88] Mr. McGoey confirmed the compensation committee had no information about comparable compensation in the market when it came to its recommendations about establishing the bonus pool and how much should be set aside to fund it. The committee had no comparables or external advice on the issue of salary and bonuses. Mr. McGoey testified that he did not think there were any comparable situations that could be likened to his compensation.

[89] Mr. McGoey confirmed there was no written policy for executive compensation at UBS in 2009. There was no policy manual stipulating the criteria or performance factors to be considered in setting management compensation. He also confirmed the compensation committee did not retain any external third party compensation advisor to guide it in its deliberations. As I have also mentioned, all members of the compensation committee held SAR units, and would be personally affected by any decision taken in relation to the SAR units. No member of the compensation committee could be considered "independent".

[90] While the bonus pool was reduced from the $7 million figure Mr. McGoey had recommended to $3.4 million, Mr. McGoey could not explain how the board came to the $3.4 million figure, other than the board concluded his $7 million number was "too high". Mr. McGoey described the board's discussion leading to the reduction as "robust". He did not, however, provide any detail about what was actually discussed about the notion of paying the bonuses, who might receive them, or why, or how the actual quantum of the pool was decided.

Mr. McCarthy's role

[91] I have already mentioned the letter and email David McCarthy sent to Mr. McGoey in relation to the board's consideration of compensation payments. Mr. McCarthy is a senior corporate and commercial lawyer at the law firm Stikeman Elliott. He has extensive experience acting for both private and public companies, and has advised many of them on issues of corporate governance. In 2009 he was the head of Stikeman's corporate department.

[92] In 2009, Mr. McCarthy acted for both Look and UBS as their corporate counsel. Before that he had represented Mr. McGoey in his negotiations with UBS on the first employment contract. Mr. McCarthy was actively involved on the plan of arrangement for Look beginning in late 2008. He was knowledgeable about the entire Inukshuk deal through which Look sold its spectrum to Inukshuk. He was also involved to some degree in the discussions surrounding the changes to the SAR plan.

[93] Mr. McCarthy explained that the Inukshuk transaction had three potential closing dates, first, when the agreement was signed, court approval was obtained and the first $30 million of the $80 million purchase price was paid. The second date was December 31 when $20 million was due, but if and only if Inukshuk still wanted to proceed with the transaction. The final closing would occur after all regulatory approvals had been obtained and the licence for the spectrum was transferred. This is when the final $30 million payment would be due. It could be deferred as long as three years following the first payment.

[94] Mr. McCarthy went on to say that the UBS SAR plan was not clear on its face whether this transaction would create a triggering event or not. The plan provided that the board could interpret the plan essentially as it saw fit. The board resolved that the first payment would constitute a triggering event.

[95] Although Mr. McCarthy provided the UBS board with an opinion letter about the business judgment rule, he did not provide any advice about the particular process by which the board arrived at its decisions regarding SARs cancellation and bonus pools, nor did he provide any advice about the quantum of the benefits established.

KPMG raises questions

[96] KPMG were UBS' auditors. They began their year-end audit in September of 2009. Mr. Kavanagh was the KPMG audit partner in charge of the UBS audit. KPMG raised a number of questions about the cancellation of the SAR plan, the use of "$0.40 as a fair value measure applied in the determination of cash compensation relative to the stock options and SARs previously cancelled", and the failure to obtain an external report or valuation assessment to support the reasonableness of the 40 cent figure, as well as the failure to obtain an external opinion concerning the reasonableness of the retention compensation approved. These were only some of the pointed questions KPMG had.

[97] Mr. McGoey responded to KPMG's questions. At the end of the day, KPMG issued a "clean" audit report for UBS. The financial statements contained particulars of both the SAR cancellation and the bonus pool. These figures were also disclosed in the Management Information Circular that was sent to shareholders as part of the necessary material for the annual general meeting scheduled for February of 2010.

[98] The MIC disclosed Mr. McGoey's total compensation for fiscal 2009 at about $8.3 million. That figure was broken down as follows:

a) Managment services fees (that is, the equivalent of salary that Mr. McGoey received through Jolian) of $570,000;

b) UBS director's fees of $64,500;

c) "contingent awards" of $1.8 million;

d) "contingent awards" from Look of about $5.566 million;

e) "other" compensation of $51,622; and

f) Option based award of $249,000.

The MIC described the "contingencies" for items (c) and (d) as Look's receiving the full $80 million consideration for the Inukshuk deal, and UBS' having adequate cash resources. By this time, Look had received the entire $80 million purchase price.

[99] A group of shareholders was incensed by the amounts of managment compensation. The annual general meeting in February of 2010 was difficult, and was followed by an all out proxy battle for control of the board.

The Board is removed and Mr. McGoey is not appointed as CEO

[100] The proxy fight played out at a special meeting of shareholders in May of 2010. The dissident group prevailed. The board was removed and a new slate elected. Mr. McGoey was not a member of the new slate, and accordingly was not elected to the new board. The new board did not appoint Mr. McGoey as CEO.

[101] Mr. McGoey took the position the fact he was not elected to the board, and the new board had failed to appoint him as CEO constituted a "termination without cause" under the Jolian Management Services Agreement, thus entitling him to open his golden parachute.

[102] Mr. McGoey demanded payment. UBS did not pay.

Mr. McGoey sues UBS

[103] Mr. McGoey then sued UBS, claiming not only his golden parachute, but also payment of and indemnification for his legal fees and disbursements in trying to secure payment. As I have mentioned, he successfully moved for summary judgment on the issue of payment of the legal fees. Marrocco J found in favour of Mr. McGoey and ordered UBS to make the indemnity and reimbursement payments. He also said, however, that those payments were subject to any findings of misfeasance the court might make against Mr. McGoey. In those circumstances, Mr. McGoey might have to repay any amounts he had received.

[104] UBS launched an appeal from Marrocco J's decision, but later abandoned it. Instead UBS sought protection from its creditors pursuant to these proceedings under the *Companies' Creditors Arrangement Act.*

UBS seeks protection under the Companies' Creditors Arrangement Act

[105] Once UBS began this application, Mr. McGoey's lawsuit was stayed. Instead, he asserted his claims for payment as part of the claims determination process in the *CCAA* proceeding.

Mr. McGoey files his proof of claim

[106] Mr. McGoey filed a proof of claim in the amount of $10,112,648.[8] The claim was divided into four components. The first was for $7,632,300 plus taxes in relation to the "Jolian Termination Payment" that Jolian asserted was due under the Jolian Management Services Agreement. This was Mr. McGoey's golden parachute, calculated at 300% of the total of all compensation amounts under the Jolian Management Services Agreement, (annual fee, bonus, etc).

[107] The second was for $1,256,677 in relation to the unpaid bonus that had been awarded to Jolian.

[108] The third was for $628,338 plus taxes in relation to the cancellation of the SAR Plan.

[109] The last was for $595,333 in legal costs. Jolian claimed indemnification for this amount under the Jolian Management Services Agreement.

The Monitor disallows Mr. McGoey's proof of claim

[110] The Monitor disallowed the proof of claim in its entirety. It took the position in relation to the Jolian Termination Payment that first, the obligation had not been triggered, and second, even if it had, its effect was oppressive and disregarded the interests of UBS' shareholders.

[111] As to the unpaid bonus, the Monitor and UBS took the position that UBS had an "after acquired" cause to terminate Jolian for cause, and therefore has no obligation to pay the unpaid bonus.

[112] On the issue of the SAR Termination payment, the Monitor and UBS took the position that the payment declared on the cancellation of the SAR plan reflected a notional UBS share price of $0.40, even though the UBS shares were trading at only

---

[8] By the time the proof of claim was filed, interest had accrued. The proof of claim includes accrued interest to that date.

$0.16. They suggested the decision to alter the SAR plan was not made in the exercise of the board's reasonable business judgment, and should therefore be set aside.

[113] The disallowance goes further, and says the award for the termination of the SAR plan is oppressive or unfairly prejudicial to or unfairly disregards the interests of UBS' shareholders. It says the Jolian SAR termination payment should therefore be declared void.

[114] Finally, on the issue of indemnification, the Monitor's first response was to refer to UBS' appeal of Marrocco J's decision on the summary judgment motion. Now UBS relies on the saving provision of the judgment, and says Mr. McGoey's actions are acts of misfeasance, and therefore the indemnification does not come into play.

[115] Mr. McGoey disputed the disallowance of the proofs of claim. UBS then responded, setting out its defences to Mr. McGoey's and Jolian's claims. During the course of this trial, Mr. McGoey amended his claim. Now, instead of claiming 300% of the new bonus amount, he has reduced the accelerated bonus calculation to the average of the bonuses paid in the three prior years. Accordingly, his total claim is now calculated in this way:

a) Deferred bonus award of $1.2 million plus SAR cancellation payouts of $600,000 for a total of $1.8 million.

b) Termination without cause benefits of 300% of the total of:

   i) Base fee of $570,000 under Jolian Management Services Agreement; plus

   ii) Average of bonuses awarded between 2005 and 2008, being $400,000

   For a total termination claim of $970,000 x 3 = $2.9 million

   iii) Reimbursement and indemnification of $1,134,510[9] for legal, accounting and auditing expenses pursuant to the Jolian Management Services Agreement and Marrocco judgment;

All for a total of $5,844,510, plus interest and taxes.

[116] This is the general factual underpinning for the issues in this trial. I turn now to a discussion of the legal framework that governs those issues. The parties do not disagree on the broad legal principles that apply.

---

[9] This includes additional legal fees incurred since the summary judgment motion before Marrocco J.

The legal framework:

Directors owe the corporation a fiduciary duty

[117] Boards of directors owe a fiduciary duty to the corporation they serve. Directors must act honestly and in good faith, with a view to the best interests of the corporation. They must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. [10]

The "business judgment rule"

[118] Generally speaking, a court will not interfere with what has been described as a board's exercise of business judgment. This is referred to as the "business judgment rule". It begins with the presumption that in coming to their decisions, directors acted on an informed basis, in good faith and in the best interests of the corporation.[11]

[119] The business judgment rule protects directors from those who might second guess their decisions. Courts should avoid using hindsight in assessing directors' decisions. The court's role is to examine the board's decisions to determine whether the directors made a reasonable decision. The reasonableness of the decision is determined on an objective standard. It is not enough for the board members to believe subjectively they are acting in the corporation's best interests, where objectively that is not the case.

[120] What then is business judgment? Canadian courts have adopted a deferential approach to evaluating directors' decisions. This is because courts recognize that the directors have the expertise and first hand understanding of the corporation's business needed to make those decisions. Although a board's decisions need not be perfect they must, however, fall within a range of reasonable alternatives. The reasonableness of a decision is assessed in light of all the circumstances the directors knew or should have known.[12]

[121] In sum, as along as a business decision is considered and informed, and made honestly and in good faith with a view towards the best interests of the corporation, a court will give considerable deference to it.

[122] I must now examine the board's and Mr. McGoey's actions and decide whether business judgment is what was exercised here, or whether it was self help, or worse, breach of fiduciary duty, dressed in business judgment's clothes.

---

[10] *UPM-Kymmene Corp. v UPM-Kymmene Miramichi Inc.,* [2002] O.J. No. 2414, (S.C.J.), aff'd [2004] O.J. No. 636 (O.C.A.) *(UPM)*

[11] *BCE Inc.*

[12] *People's Department Stores Ltd. (1992) Inc., Re,* 2004 SCC 68

Discussion:

[123] UBS does not take issue with the services Mr. McGoey performed for the company. It frames the real issue as focusing on Mr. McGoey's actions between May of 2009 when the court confirmed the sale of Look's spectrum to Inukshuk and mid-September of 2009 when Inukshuk made the last payment on account of the $80 million purchase price. It was in that period Mr. McGoey and his co-directors did two things. They cancelled the UBS SAR plan and replaced it with a fixed cancellation award instead, based on a share price of 40 cents. They also created a deferred bonus award in Mr. McGoey's favour. The SAR cancellation plan resulted in an entitlement of $600,000 for Mr. McGoey. The deferred bonus award gave him $1.2 million.

Issues with the evidence

[124] As I mentioned earlier, only Mr. McGoey testified on behalf of himself and Jolian, and UBS called only UBS' laywer Mr. McCarthy, Mr. Kavanagh, (UBS' former auditor from KPMG), and the compensation expert, Mr. Thompson. I heard nothing from any other board member or member of the management team or compensation committee at UBS to confirm what Mr. McGoey said at trial. Mr. McGoey says his evidence is completely corroborated by all the contemporaneous documents filed at the trial, and therefore there was no need for him to call any other witnesses to confirm his version of events. He says since the law presumes a person is acting in good faith[13] the onus lies on UBS to prove otherwise.

[125] UBS says I should draw an adverse inference from Mr. McGoey's failure to call any other witnesses to confirm his position that the board acted in the proper exercise of its business judgment. Mr. McGoey points out that UBS could have called witnesses to refute what Mr. McGoey said about the board's deliberations. Mr. McGoey says I should draw an adverse inference from their failure to do so, and must conclude there are no witnesses who would have refuted his testimony.

[126] In a sense, both sides are right. Accepting both parties' assertions, however, leaves me nowhere further ahead.

[127] What troubles me is that regardless of who might have called the evidence I have no independent evidence of what either the compensation committee or the board actually discussed and considered when coming to their decisions. A description of discussions as "robust", while it suggests the board was not steamrollered into its decisions, still gives me no assistance in determining whether the board considered appropriate factors, including the best interests of the shareholders, in coming to those decisions.

---

[13] See for example, *BCE Inc.*

[128] This leads me to consider the board's decision making process, albeit in somewhat of an evidentiary lacuna. I do, however, have the expert evidence of Michael Thompson to assist in my analysis of the board's actions.

Mr. Thompson's evidence

[129] Michael Thompson is a partner at Mercer, a global leader in human resource consulting, outsourcing and investment services. Mr. Thompson has been an executive compensation consultant for almost thirty years, advising boards of directors of public companies on all aspects of executive compensation. Mr. Thompson was qualified as an expert to give opinion evidence on issues of executive compensation. UBS retained him to to answer three questions:

a) What were standard practices followed by Canadian public companies in awarding Executive Compensation in 2009 generally, and more particularly in awarding bonuses, share appreciation rights and other forms of compensation?

b) In 2009, what practices should a board of Directors of a public company in Canada have followed when compensating officers and/or directors in circumstances where the Board of directors of the public company has treated (i) a sale of a principal asset by a subsidiary and (ii) a decision by the subsidiary to wind up, as being a sale of a principal asset of the public company?

c) Were the restructuring awards granted by UBS's Board of Directors in 2009 within a range that Mercer would have considered appropriate if it had been advising the Board of Directors on such awards in connection with the sale?

[130] Both (a) and (b) related to standard practices. Mr. Thompson confirmed that corporate directors are obliged to establish the compensation levels for executive officers. The board is therefore responsible for setting the CEO's compensation. Since boards are inherently subject to some influence from management, it is imperative, he says, that boards have independent directors to ensure objective, fact based data lead to decisions that are in the best interests of shareholders. He testified that by 2008 and 2009[14] it was generally accepted that compensation committees should be entirely independent. This, of course, was confirmed by s.3.15 the recommendations inof National Policy 58-201-Corporate Governance Guidelines.

---

[14] This was the time of the world-wide economic "meltdown" and its financial consequences.

[131] Mr. Thompson commented on the issue of the need for transparency in setting executive compensation, which he described as a "hot button" issue for shareholders. He said shareholders expect full, clear disclosure of executive compensation, especially for the CEO, so they can assess its appropriateness,

[132] Mr. Thompson went on to say that it is standard for corporate boards to look at market trends, practices in the same industries, to validate the amount of compensation and design a compensation package that is consistent with these best practices.

[133] Mr. Thompson also testified about SAR plans in general. He said it is rare to cancel them, but when they are cancelled it is usually at less value than market or trading value. Usually the plan will then be replaced with a different plan that is better aligned with shareholder interest.

[134] In coming to his opinions, Mr. Thompson did not have any discussions with Mr. McGoey, or ask him any questions about the board's decision making processes. Mr. Thompson relied on UBS' publicly filed documents as well as some internal corporate documents. He reviewed minutes of UBS' board meetings, and of the compensation committee. He also reviewed some of the court documents. Mr. Thompson's report recognizes that he had not "heard from or considered the views of management and the other non-executive directors, other than as set forth in certain of the above-referenced documents. However, many of the relevant facts we rely upon are not contentious as they come from the company's own documentation."[15]

[135] I accept Mr. Thompson's general comments about executive compensation and the best practices surrounding setting it. Mr. Thompson opines that the enhanced compensation package awarded to Mr. McGoey does not pass any test of reasonableness. I heard no other independent evidence to refute Mr. Thompson's opinion. His evidence gives me a helpful context in which to consider the board's decision making processes and analyze them in the context of the board's fiduciary duty.

The Board's decision making processes

[136] Directors must act rationally, reasonably and on an informed basis. I have no evidence of how, in particular, the bonus award to Mr. McGoey was quantified and allocated. It would have been helpful to know how both the compensation committee and the board came to their decisions in this regard. What did they discuss? What factors did they consider? Which factors did they accept and which did they reject? How did the interests of shareholders come into their deliberations? I have no answers to any of these questions.

---

[15] Mercer Report, exhibit 27 at trial, at page 5

[137] Answers to these questions are particularly important when the magnitude of the awards in question is so completely disproportionate to anything that was ever awarded before. I am left wondering, even after five days of testimony from Mr. McGoey, what really went on in the decision making process, either at the committee or the board level.

[138] UBS takes no issue (at least in argument) about the validity of either the employment agreement or the Jolian Management Services Agreement. It concedes both were negotiated at arms' length and are *prima facie* valid.

[139] UBS also accepts that it was within the UBS board's business judgment to treat the sale at Look as a triggering event for the UBS SARs plan. UBS points out, quite rightly, that when the board first considered what UBS would have to pay out on the SARs they considered a range of potential share prices. The board, like Mr. McGoey, expected a lift in the share price at UBS as a result of the Inukshuk sale. It was not unreasonable to expect a share price of around 40 cents. The board considered a range of potential payouts on the SAR plan, based the range of potential share prices.

[140] The difficulty arises with the cancellation of the SAR plan, and creating a fixed price at 40 cents per unit at a time when the board knew, or ought to have known, that the market had not reacted to the Inukshuk sale as they had hoped. There was no lift in the share price. Indeed, the board knew the stock was stuck at 15 cents. I must look at this knowledge, in the context of what the board and compensation committee also knew, in determining whether the board's decisions were a proper exercise of business judgment.

[141] The board (and presumably the compensation committee) knew that section 3.15 of National Policy 58-201 recommended that compensation committees be made up of independent members.

[142] Here, the UBS compensation committee had no independent members at all. Each of the members of the compensation committee held SARs units, and stood to benefit from any enhancements to the SAR plan. Having made the decision to trigger the SARs, the board members (most of whom were SAR holders) also knew their personal SAR units would likely be worth very little if they were valued according to the terms of the plan.

[143] The board and compensation committee knew that while section 3.15 was not prescriptive, corporations were encouraged to consider this provision in developing their own corporate governance policies. I have no evidence that the guideline was considered, or that the board and compensation committee ever developed their own corporate governance policies.

[144] The board also knew, from Mr. McCarthy's letter, that they were required to continue to meet their fiduciary obligations to the corporation when setting executive compensation. This involved putting the interests of the corporation and its shareholders ahead of its own. As I have already said, I have no evidence of how, or if, the board did this.

[145] The decision to cancel the SAR plan really came out of the blue, and only when it was apparent to the board members, who were the majority of the SAR unit holders that their SARs units would have little or no value on the triggering date.

[146] Absent any evidence to the contrary (and there is really none), I am led to the inescapable conclusion the decision to cancel and SARs and replace them with a fixed amount must have been driven by the board's own self interest, and not the interests of the corporation. There was nothing in it for UBS shareholders.

[147] As for Mr. McGoey's bonus, there was no business rationale for it. UBS was a holding company. It had no real employees, other than bookkeeping and secretarial staff. I fail to see how it was in UBS' interests to pay such a staggering amount of money to Mr. McGoey in order to "incentivize" him to remain with UBS. The situation at Look might be viewed differently; that issue, however, is not for me to decide.

Failure to disclose the terms of the Jolian Management Services Agreement until May 2010

[148] Mr. McGoey/Jolian say UBS triggered the termination without cause provisions of the Jolian Management Services Agreement when Mr. McGoey was not re-elected to the board or appointed CEO after the proxy fight. UBS says the board failed to disclose the terms of the Jolian Management Services Agreement until May of 2010, even though the agreement had been in place for many years. UBS suggests the provision was hidden from shareholders. UBS says it was only when the disclosure was made in 2010 that the shareholders would have learned about this provision. UBS says shareholders would only have learned of this term a month before the critical special meeting that removed the board, and therefore did not have appropriate notice of this provision before exercising their voting rights. UBS characterizes this as some kind of breach of fiduciary duty. I disagree.

[149] I do not see any real material differences in this regard between the original employment agreement and the Jolian Management Services Agreement. Mr. McGoey's employment agreement, which dated back to 2002, also contained a provision that "[T]he failure of the shareholders of the Company to re-elect the Executive to the Board or the failure of the Board to nominate the Executive for the positions of Executive Chair and Chief Executive Officer shall constitute a 'termination

without Cause' for the purposes of this Agreement."[16] The employment agreement contained a similar golden parachute to that contained in the Jolian Management Services Agreement. Shareholders would therefore have known since 2002 that Mr. McGoey would be entitled to enhanced severance if he were terminated without cause, as defined in the agreement. They would also have known that termination without cause included the situation of Mr. McGoey not being elected to the board and being appointed CEO.

[150] Although it would have been better for the Jolian Management Services Agreement to have been disclosed as soon as it was completed, I do not see the failure to do so as a material breach. Up to the date of its disclosure, the shareholders would have assumed the provisions of the employment agreement applied. Since the Jolian Management Services Agreement was the same in most of its essential terms, I fail to see how this failure to disclose would constitute a breach of fiduciary duty. It was sloppy. It was not, however, a breach of fiduciary duty. The issue is whether the board's other actions were.

Breach of fiduciary duty?

[151] Since UBS concedes the Jolian Management Services Agreement is valid, if follows there can be no issue with the 300% multiplier to determine compensation on termination without cause. That had been a feature of Mr. McGoey's entitlements since his initial employment agreement with UBS in 2002. He negotiated the golden parachute in 2002 in unimpeachable circumstances. The question is whether the enhanced figures that went into the calculation are appropriate, and fall into the "range of reasonable alternatives" that would consitute the board's proper exercise of its business judgment. In my view, they are not.

[152] In coming to its decision to cancel the SARs entitlements and replace them with benefits based on a 40 cent per share value, the compensation committee and the board did none of the things Mr. Thompson opined were standard practice. They did not follow the roadmap Mr. McCarthy had set out for them in his letter outlining their responsibilities, and particularly the elements of their exercising reasonable business judgment.

[153] The compensation committee was not independent. The board was conflicted. No one sought any independent expert advice from compensation professionals. No one appears to have considered the impact of the decisions on shareholders or the company.

[154] The 40 cent value was not arrived at by any true objective means. Instead, it represented more of a hope for share value based in large part on a Rogers

---

[16] Employment Agreement, Article 5.3.1

sale transaction that was fraught with difficulty, and nowhere near a firm transaction. The Rogers deal was dead, and there was no new potential transaction on the horizon and yet the board went through with the SAR cancellation plan and bonus awards.

[155] The SAR cancellation plan gave SAR holders what was essentially a 40 cent per share guarantee while shareholders would receive significantly less value for their shares. While valuations should not rely on hindsight, here it is clear the trading value for UBS shares has never reached anything close to the 40 cent level, either before, at or after the SARs plan was cancelled. It is also clear any valuation based on a potential Rogers deal should have been discounted for the real possibility the transaction might not close, or the purchase price might be significantly reduced.

[156] As far as the bonus pool in general, and the bonus in favour of Mr. McGoey in particular, are concerned, neither was based on any objective criteria. I recognize the Jolian Management Services Agreement clearly says that the board can award bonuses to Mr. McGoey. Section 3.2(1) says the board "may, in its absolute discretion, from time to time, recognize the performance of Jolian, applying the performance criteria the board deems appropriate." That recognition may take the form of a bonus, among other things.

[157] I was shown no performance criteria the board consisdered. Although Mr. McGoey pointed to an exhaustive list of items he first suggested formed these criteria, on cross-examination he conceded the performance items related to what he had done at Look. I must conclude that when the UBS bonus was awarded, there were no criteria. There was no objective standard. Prior bonuses for Jolian/Mr. McGoey had been in the range of $400,000 to $440,000. I heard no evidence to support any reasonable rationale for a bonus at the level of $1.2 million.

[158] But, says Mr. McGoey, the board sought and obtained advice from Mr. McCarthy. Does that satisfy the test for seeking outside advice, and approaching the issue objectively and in the best interests of the corporation?

[159] The board sought an opinion from David McCarthy. He provided general advice, but was not asked to opine on the reasonableness of the changes to the SAR and bonus plans. Mr. McCarthy's letter described the board's duties fully and accurately. He provided the board with a complete description of what it is to exercise business judgment. He did not, however, provide any assistance on the question of whether the board was actually doing so in its deliberations.

[160] In my view it is not an answer to complaints about the board's actions to point simply to a letter outlining what the board's duties are, and how it should exercise its business judgment. The court must have evidence of how exactly the board went about its task. Having board members recognize their obligations to act in the best interests of the corporation and its shareholders is not the same as leading evidence to

show that their actions were actually in those best interests, and taken only with a view to enhance those best interests.

[161] Put another way, it is not enough to say the board was given an appropriate roadmap, without showing that the board actually followed the map's directions.

[162] Similarly, the board did not seek any advice from UBS' auditors. Clearly, the auditors had concerns about the lack of independent advice on the compensation issues. While KPMG may have issued a clean audit report, that does not answer the question the court must determine of whether the board acted in the best interests of the corproration.

[163] I am not persuaded either Mr. McCarthy's letter, or the clean audit opinion are sufficient to support a conclusion the board acted only in the best interests of the corporation. In my view the board did not.

[164] The board failed to consider the interests of shareholders when it came to its decisions concerning the SAR Cancellation pool and the deferred bonus pool. Considering shareholder interests is the hallmark of a board making proper decisions in the proper exercise of its fiduciary obligations. Since the UBS board failed to do so, it follows it must have breached its fiduciary duties in coming to those decisions.

[165] This leads me to a discussion of the appropriate remedy for that breach.

What is the remedy for the breach?

[166] In *UPM* Lax J. determined that the appropriate remedy for the breaches there was to set aside the agreement that resulted from the decision taken in breach of those duties. It seems to me the same remedy should apply here.

[167] As a result, the SAR cancellation award and deferred bonus award in favour of Jolian/Mr. McGoey must be set aside. The question then becomes whether Mr. McGoey is entitled to enhanced termination awards based on his prior SAR entitlements and historical bonuses, on the basis that his termination as a board member and CEO fall into the definition of termination without cause, or whether the "Jolian Default" provisions of the Jolian Management Services Agreement have been triggered, thus disentitling him to such enhanced benefits at all.

Termination without cause?

[168] As I have said, the plain wording of the Jolian Management Services Agreement defines termination without cause to include Mr. McGoey's not being elected to the board and appointed CEO. Shareholders had known about this provision from the time Mr. McGoey first became UBS' CEO in 2002.

[169] Mr. McGoey was not re-elected to the board, and was not reappointed to the CEO position. UBS suggests somehow Mr. McGoey "engineered" this result and is therefore there can be no termination without cause. I do not agree. Even if he had, there is nothing in the Jolian Management Services Agreement to preclude him from doing so.

[170] On a plain reading of the Jolian Management Services Agreement he was thus, by definition, terminated without cause. As a result, he is entitled to his enhanced termination benefits, unless there has been a Jolian Default or some other reason to deprive him of them.

Has there been a "Jolian Default"

[171] "Jolian Default" is a defined terms under the Jolian Management Services Agreement. It is defined as follows:

> a) An act of fraud, theft or misappropriation or other act which constitutes "Cause" at common law committed by the CEO designee; and
>
> b) The material failure by the CEO designee to perform the CEO services after having received written notice of such material failure and been given reasonable time to correct same;

in each case, which is materially injurious to UBS or has not been waived by UBS.

[172] As I read the definition, both parts must be met before actions constitute "Jolian Default". I say this because the drafters clearly chose to use "and" between the two paragraphs, thus making them conjunctive.

[173] Here, regardless of whether subsection (a) of the definition has been met, there is no question subsection (b) has not. No one provided Mr. McGoey with written notice of any "material failure to perform the CEO services" together with a reasonable time to correct any such material failure.

[174] As to subsection (a), in my view it has not been met either. It would have been an easy matter for the drafters to include "breach of fiduciary duty" or "bad faith" as enumerated items of cause. They did not.

[175] It also would have been an easy matter for the drafters to define "cause" simply as "cause at common law". They did not.

[176] From this I infer that "cause at common law" in the context of this provision means acts of fraud and defalcation of the types enumerated. I cannot conclude breach of fiduciary duty falls into this category.

[177] In any event, since both both provisions of the section have not been met I therefore conclude there has been no "Jolian Default" under the Jolian Management Services Agreement. Thus UBS remains bound to pay the amounts due under the golden parachute provisions of the agreement. This is so unless there is another reason to find the obligation no longer exists.

"After acquired" cause for dismissal?

[178] UBS argues that it should still not have to make the payments because the corporation has an "after acquired" cause for dismissal. Without going into the issue of whether there is such a thing, it seems to me UBS is bound by the terms of the Jolian Management Services Agreement in terms of what constitues "cause". As I have said, since Mr. McGoey's actions do not fall into the definition of Jolian Default, I fail to see how they could constitute cause for dismissal, whether "after acquired" or not.

[179] What this means is that UBS is bound by the terms of the Jolian Management Services Agreement, as it stood before the board made the enhanced benefits I have now set aside.

Oppression?

[180] Since I have determined the enhanced benefits represented a breach of the board's fiduciary duties and have set those benefits aside, it seems to me the potentially oppressive acts have been cured and I need not deal with whether the board's actions might also constitute oppressive conduct.

What about Marrocco J's judgment?

[181] The last issue for me to consider is whether my decision thus far has an impact on Marrocco J's decision that UBS must honour its indemnity obligations in favour of Mr. McGoey/Jolian.

[182] The indemnity obligations arise under the Jolian Management Services Agreement, Article 7 of UBS' Bylaws, specific indemnity agreements between Mr. McGoey and UBS, and section 134(4.1) of the *Ontario Business Corporations Act. (OBCA).*

[183] Marrocco J determined that the indemnity provided in Article 7 of the Bylaws is "only available if the director or officer acted honestly and in good faith with a view to the best interests of the Corporation."[17] Given my findings above, I conclude Mr. McGoey is not entitled to indemnification under the Bylaws.

---

[17] *Jolian Investments Limited v. Unique Broadband Systems Inc.,* 2011ONSC3241 at paragraph 80

[184] Marrocco J also concluded that the expenses for which Mr. McGoey/Jolian claimed reimbursement or indemnification were all covered by section 3.3 of the Jolian Management Services Agreement. He specifically found UBS would be obligated to indemnify even in relation to a suit it commenced against Mr. McGoey. He found there was no limiting language in the Jolian Management Services Agreement to exclude to that result.[18]

[185] Marrocco J specifically held that Jolian/Mr. McGoey's legal expenses incurred in pursuit of the claims for $600,000 for the SARs entitlement and $1.2 million for the deferred bonus were the type of legal expenses covered by the indemnity provisions.[19]

[186] The question is whether UBS' indemnification obligations under the Jolian Management Services Agreement are limited by my finding of breach of fiduciary duty. Marrocco J specifically stated that Mr. McGoey "is entitled to the indemnification mandated by Article 7 [of the Jolian Management Services Agreement] provided that he acted honestly and in good faith with a view to the best interests of the Corporation."

[187] Given my findings that Mr. McGoey breached his fiduciary duties to UBS in relation to setting the enhanced benefits for himslef, I must conclude UBS has no obligation to indemnify. Any money UBS has paid on this account must be repaid.

Decision:

[188] For all these reasons, judgment will issue in the following terms:

a) The SAR cancellation award and deferred bonus award in favour of Jolian/Mr. McGoey are set aside;

b) Mr. McGoey's actions do not constitute "cause" or a "Jolian Default" under the Jolian Management Services Agreement;

c) Mr. McGoey's not being elected to the UBS board or being appointed as CEO constitute "termination without cause" under the Jolian Management Services Agreement;

d) Jolian/Mr. McGoey is entitled to the enhanced severance under the Jolian Management Services Agreement, but calculated on the basis of what the entitlement would have been prior to the SARs cancellation and deferred bonus award. Jolian/Mr. McGoey will file a revised proof of claim within 30 days to reflect this finding;

---

[18] *Ibid.* at paragraph 42
[19] *Ibid.*, paragraph 43

e) The indemnity provisions of section 7.1 of the Jolian Management Services Agreement do not apply. Jolian/Mr. McGoey is not entitled to indemnification from UBS. Any money advanced on this account must be repaid.

[189] If the parties are unable to agree on the issue of costs, they may make written submission to me. They are to be no more than three pages in length. They will include bills of costs, with details of each lawyer's year of call and actual billing rate to his client, along with any settlement offers that might bear on the issue of costs. Mr. McGoey's submissions will be delivered within two weeks of the release of these reasons, with UBS' to follow within two weeks of then.

MESBUR J

Released: 20130521

Feb 19/13 CV-11-9283-00CL

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS, INC.

May 21/13
For written reasons released today, judgment to issue in terms of paragraphs 188 & 189 of Notice of Motion.
Newbould J.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

CCAA PLEADINGS BRIEF

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Clifford I. Cole (LSUC No. 20549T)
Tel: 416-862-3631
Fax: 416-862-7661
clifford.cole@gowlings.com

Joe Thorne (LSUC No. 58773W)
Tel: (416) 369-7223
Fax: (416) 862-7661
joe.thorne@gowlings.com

LAWYERS FOR THE APPLICANTS, Unique Broadband Systems Inc. and UBS Wireless Services Inc.