COURT OF APPEAL FOR ONTARIO

CITATION: Unique Broadband Systems, Inc. (Re) 2014 ONCA 538
DATE: 20140710
DOCKET: C57884

Sharpe, Gillese and Hourigan JJ.A.

BETWEEN

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.

Clifford I. Cole and Benjamin Na, for the appellant, Unique Broadband Systems, Inc.

Joseph Groia and Tatsiana Okun, for the respondents, Jolian Investments Limited and Gerald McGoey

Heard: June 17, 2014

On appeal from the order of Justice Ruth E. Mesbur of the Superior Court of Justice, dated May 21, 2013, with reasons reported at 2013 ONSC 2953.

Hourigan J.A.:

[1] Unique Broadband Systems Inc. ("UBS") appeals the judgment of Justice Mesbur, dated May 21, 2013, rendered in connection with a claim made by Gerald McGoey and his personal company, Jolian Investments Limited ("Jolian"),

pursuant to s. 20 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] The trial judge ordered UBS to pay Jolian and Mr. McGoey's claim for an enhanced severance payment that was the equivalent to 300% of Mr. McGoey's compensation (the "Enhanced Severance"). That order is the subject of UBS' appeal.

[3] The trial judge dismissed Mr. McGoey and Jolian's claims for payment of a SAR Cancellation Award, a Bonus Award, and indemnification for legal and other professional Services expenses.[1] That order is the subject of a cross-appeal by Mr. McGoey and Jolian.

[4] For the reasons that follow, I would grant the appeal and dismiss the cross-appeal.

FACTS

[5] UBS is a public company listed on the TSX Venture Exchange. It is incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "*OBCA*").

[6] In 2002, Mr. McGoey was appointed a director and acting CEO of the corporation. Eventually, Mr. McGoey took on the role of CEO on a permanent

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[1] The capitalized terms are defined below.

basis. His employment relationship with UBS was first governed by a personal employment contract and later by a management services agreement between UBS and Jolian dated May 3, 2006 (the "Jolian Management Services Agreement"). Both the personal employment contract and the Jolian Management Services Agreement contained a "golden parachute" provision which granted Mr. McGoey enhanced termination benefits in certain situations.

[7] Since November 2006, UBS had in place an incentive-driven share appreciation rights plan ("SAR Plan") for its directors and senior management. Upon certain triggering events, a SAR unit holder would be paid an amount equal to the difference between the market trading price of a UBS share and a strike price specified in the SAR Plan.

[8] In 2003, UBS acquired a controlling 51.8% equity interest in Look Communications Inc. ("Look"), a telecommunications company. Mr. McGoey also served as a director and CEO of Look. UBS and Look were parties to a services agreement pursuant to which Mr. McGoey performed management services for Look. Other than those services, UBS was essentially a holding company and did not engage in any active business.

[9] Look's primary asset was a band of telecommunications spectrum. In early 2009, Look engaged in a process to sell the spectrum through a court-supervised plan of arrangement. Ultimately the spectrum was sold for $80 million on May 4,

2009 to Inukshuk Wireless Partnership ("Inukshuk"), a consortium of Rogers Communications Inc. ("Rogers") and Bell Canada (the "Spectrum Sale"). Mr. McGoey expected that the sale would generate a significantly higher sale price and was very disappointed with the figure offered by Inukshuk.

[10] The board of directors of UBS (the "UBS Board") resolved to treat the Spectrum Sale as a triggering event pursuant to the SAR Plan. Prior to the announcement of the Spectrum Sale, UBS's shares were trading at approximately $0.15 per share. The UBS shares were anticipated to appreciate as a consequence of the Spectrum Sale's announcement. However, the anticipated share price increase did not materialize and the shares continued to trade at the $0.15 range after the announcement.

[11] After court approval of the Spectrum Sale on May 14, 2009, Mr. McGoey engaged in negotiations with Rogers for a potential purchase of the balance of Look's assets, including roughly $300 million in tax losses and similar assets, subscribers, and real estate. Rogers withdrew from the negotiations on July 20, 2009 and the transaction never came to fruition.

[12] Also after the Spectrum Sale, the UBS Board's compensation committee, which consisted of Mr. McGoey and two other UBS Board members, began reviewing the SAR Plan. Each member of the compensation committee had a considerable number of SAR units.

[13] Executive compensation was on the agenda for the UBS Board meeting of June 17, 2009. In anticipation of that meeting, Mr. McGoey sought the advice of UBS' outside legal counsel, David McCarthy, regarding board approval of executive bonuses. Mr. McCarthy advised that, while s. 3.15 of National Policy 58-201 (which deals with the Corporate Governance Guidelines) says that a board should appoint a compensation committee entirely of independent directors, this was a guideline only and was not a requirement either pursuant to securities law or TSX Rules.

[14] Mr. McGoey also requested that Mr. McCarthy provide the UBS Board with a letter outlining its authority, duties, and obligations in making payments to officers and employees. Mr. McCarthy provided such a letter, dated June 17, 2009. In that letter, he specifically advised the UBS Board that, in exercising its power to compensate officers and employees, the directors were obliged to meet their fiduciary obligations to the corporation.

[15] At the June 17, 2009 UBS Board meeting, the directors considered the issue of the SAR Plan. Mr. McCarthy's letter was before the UBS Board and Mr. McCarthy was present for a portion of the meeting. Mr. McCarthy was not asked to opine on the UBS Board's decision at the meeting. He also did not provide the UBS Board with advice regarding the UBS Board's process or about the quantum of the benefits being considered.

[16] At the meeting, each director disclosed his conflict of interest regarding their SAR unit holdings. The directors then unanimously resolved to cancel the SAR units and establish a SAR cancellation payment pool of $2,310,000, based on a fixed unit price of $0.40 per share. Under this new arrangement, Mr. McGoey, along with three other directors and one member of management, would receive a SAR cancellation award (the "SAR Cancellation Awards") based upon the $0.40 per unit figure.

[17] The payment was contingent on: Look receiving the full compensation of $80 million from the Spectrum Sale; UBS receiving adequate cash resources; Mr. McGoey and the other SAR Plan unit holders relinquishing all rights to the SAR units awarded to them as of May 31, 2009; and the SAR Plan unit holders executing releases with respect to the SAR Plan and a stock option plan established in 2002.

[18] The UBS Board met on July 8 and 9, 2009. At that meeting, the directors considered the issue of awarding bonuses for certain personnel. Mr. McGoey proposed the establishment of a bonus pool of $7 million. That plan was not approved. However, the UBS Board did approve the establishment of a bonus pool in the amount of $3.4 million (the "Bonus Pool").

[19] The SAR Cancellation Awards and the Bonus Pool were allocated to the recipients in August 2009. Under the SAR Cancellation Awards, Mr. McGoey was

allocated to receive $600,000 and, under the Bonus Pool, he was allocated to receive $1,200,000.

[20] In addition to the SAR Cancellation Awards and the Bonus Pool, Mr. McGoey and the other directors of Look also established a SAR cancellation payment pool and a bonus pool for that company. The total amount funded directly by UBS or indirectly, through its 51.8% equity interest in Look, in the new compensation plans of the two companies was $14,637,025, or approximately 97.6% of the market capitalization of UBS.

[21] The disclosure of the SAR Cancellation Awards and the Bonus Pool was met with resistance by UBS shareholders. Faced with this resistance, Mr. McGoey caused UBS to advance to him $200,000 for the payment of anticipated legal fees.

[22] A special shareholders' meeting was held pursuant to s. 122 of the *OBCA* on July 5, 2010. At that meeting, Mr. McGoey and the other directors were removed and not re-elected as directors of UBS. Mr. McGoey then resigned as CEO of UBS and took the position that he was terminated without cause because he was not re-elected to the UBS Board.

[23] Mr. McGoey commenced an action against UBS seeking, *inter alia*, payment of Enhanced Severance in the amount of $9,500,000. He successfully moved for partial summary judgment before Marrocco J. on the issue of the

payment of legal fees. However, Marrocco J.'s decision was subject to any finding of misfeasance that the court might make against Mr. McGoey.

[24] On July 5, 2011, UBS was granted *CCAA* protection. It was ordered that Mr. McGoey's lawsuit be determined pursuant to the claims process under s. 20(1) of the *CCAA*. Mr. McGoey filed a proof of claim in the amount of $10,112,648, which the monitor disallowed in its entirety. Mr. McGoey sought to reverse that denial and a trial was ordered on the issue. That trial is the subject of this appeal and cross-appeal.

DECISION OF THE TRIAL JUDGE

[25] After thoroughly reviewing the underlying facts, the trial judge considered the law with respect to the business judgment rule. She concluded that the business judgment rule would only be of assistance to Mr. McGoey if he acted honestly and in good faith, with a view towards the best interests of the corporation.

[26] The trial judge then examined Mr. McGoey's actions to determine whether they would be protected by the business judgment rule or whether they constituted a breach of his fiduciary duty. She noted that, since Mr. McGoey was the only UBS director who testified, she had no independent evidence of what the compensation committee or the UBS Board discussed and considered when deciding on the SAR Cancellation Awards and the Bonus Pool. In particular, she

had no evidence as to how or if the UBS Board followed Mr. McCarthy's advice that the directors were obliged to meet their fiduciary duties to the corporation when setting executive compensation.

[27] The trial judge accepted the evidence of Michael Thompson, a partner at Mercer, who was qualified as an expert regarding executive compensation and best practices for establishing executive compensation. She noted that Mr. Thompson opined that Mr. McGoey's compensation package did not pass any test of reasonableness and that she had heard no other independent evidence to refute Mr. Thompson's opinion. The trial judge found that Mr. Thompson's evidence gave her a "helpful context" to consider the UBS Board's decision-making process as part of her fiduciary duty analysis.

[28] The trial judge focused on the decision of the UBS Board to cancel the SAR Plan and set a price of $0.40 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": at para. 140.

[29] The trial judge noted that the UBS compensation committee did not have any independent members, as all of the directors on that committee held SAR units.

[30] The trial judge made the following findings with respect to the SAR Cancellation Awards and the Bonus Pool, at paras. 145-147:

> 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.
>
> Absent any evidence to the contrary (and there is really none), I am led to the inescapable conclusion the decision to cancel [the] 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.
>
> 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.

[31] The trial judge went on to find that the $0.40 unit value was not determined by any objective means, did not reflect the actual market price for the shares, and "represented more of a hope for share value based in large part on a Rogers sale transaction that was fraught with difficulty, and nowhere near a firm transaction": at para. 154. She stated that any valuation based on the possible Rogers transaction "should have been discounted for the real possibility the transaction might not close, or the purchase price might be significantly reduced": at para. 155.

[32] With respect to the Bonus Pool, the trial judge found that it was not based on any objective criteria. She noted that, previously, Mr. McGoey's bonuses had been in the range of $400,000 to $440,000 and stated that she had "heard no evidence to support any reasonable rationale for a bonus at the level of $1.2 million": at para. 157.

[33] The trial judge rejected the argument advanced by Mr. McGoey that the UBS Board's actions were done on the advice of Mr. McCarthy, finding that he "was not asked to opine on the reasonableness of the changes to the SAR and bonus plans": at para.159.

[34] The trial judge concluded that the UBS Board breached its fiduciary duties to UBS in establishing the SAR Cancellation Awards and the Bonus Pool. She set aside the allocations to Mr. McGoey and Jolian pursuant to the SAR Cancellation Awards and the Bonus Pool.

[35] The next issue was whether Mr. McGoey and Jolian triggered the default provisions in the Jolian Management Services Agreement, such that they were disentitled to the golden parachute benefits under the agreement. Specifically, Mr. McGoey and Jolian are disentitled to golden parachute benefits if Mr. McGoey and Jolian are in default as that term is defined in the agreement. The trial judge concluded that a breach of fiduciary duty did not qualify as a default under the Jolian Management Services Agreement and, therefore, UBS was

obliged to pay the amounts due under the golden parachute provisions of the agreement.

[36] UBS relied upon the oppression remedy provisions in the *OBCA*. However, the trial judge found, at para. 180, as follows:

> 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.

[37] The trial judge concluded that UBS had no obligation to indemnify Mr. McGoey for his legal fees because he had breached his fiduciary duties to the corporation.

[38] In her costs decision, the trial judge found that there was divided success at trial and ordered that there be no costs.

ISSUES

[39] The appeal and cross-appeal raise the following issues:

(i) Did the trial judge err in finding that Mr. McGoey breached his fiduciary duties to UBS?

(ii) Did the trial judge err in finding that Mr. McGoey is not entitled to indemnification from UBS?

(iii) Did the trial judge err in finding that Mr. McGoey is entitled to Enhanced Severance under the Jolian Management Services Agreement? and

(iv) Did the trial judge err in failing to consider the oppression remedy argument advanced by UBS?

POSITIONS OF THE PARTIES

[40] UBS submits that the trial judge did not err in finding that Mr. McGoey had breached his fiduciary duties to UBS by virtue of his involvement in establishing the SAR Cancellation Awards and the Bonus Pool. Nor did the trial judge err in finding that, as a consequence of the breach, Mr. McGoey was not entitled to indemnification from UBS. However, UBS submits that the trial judge erred in finding that Mr. McGoey's conduct did not amount to "Cause" or a "Jolian Default" under the Jolian Management Services Agreement and that Mr. McGoey was entitled to Enhanced Severance. Specifically, UBS argues that the trial judge's interpretation of the Jolian Management Services Agreement is inconsistent with s. 134(3) of the *OBCA* and leads to a commercially absurd result. In addition, UBS submits that the trial judge, having rejected UBS's interpretation of the Jolian Management Services Agreement, was obliged to consider the oppression remedy argument it had advanced.

[41] In his cross-appeal, Mr. McGoey submits that the trial judge erred in finding a breach of fiduciary duty. His position is that the actions taken regarding the SAR Cancellation Awards and the Bonus Pool were within a range of commercially reasonable decisions and are, therefore, protected by the business judgment rule. He also submits that the trial judge erred in finding that he was not entitled to indemnification from UBS under the terms of the Jolian Management Services Agreement. Mr. McGoey argues that the trial judge otherwise correctly interpreted the Jolian Management Services Agreement and that, because the oppression remedy does not apply, the trial judge was under no obligation to consider that argument.

ANALYSIS

(i) Breach of Fiduciary Duty

[42] As mentioned above, Mr. McGoey asserts that the trial judge erred in finding that he had breached his fiduciary duties. At the heart of Mr. McGoey's submission is that the decisions he made with respect to the SAR Cancellation Awards and the Bonus Award were done with the advice of experienced legal counsel and are protected by the business judgment rule.

[43] In my view, the trial judge's finding that Mr. McGoey's breached his fiduciary duties to UBS was well supported in the evidence before her and by the lack of any clear explanation from Mr. McGoey as to how the UBS Board decided

to establish the SAR Cancellation Awards and the Bonus Pool. For the reasons set forth below, I see no error in the trial judge's reasoning and in her conclusion that Mr. McGoey's actions were driven by self-interest, unsupported by any reasonable or objective criteria, and contrary to the best interests of UBS.

[44] Below I consider the general principles of the law of fiduciary duties, an analysis of the trial judge's decision regarding the SAR Cancellation Awards and Bonus Pool, and the defences raised by Mr. McGoey.

General Principles

[45] It is undisputed that, Mr. McGoey, as a director and CEO of UBS, owed the company fiduciary duties. The imposition of fiduciary duties on directors and officers of a corporation is consistent with the origins of the doctrine in trust law. A director or senior officer of a corporation is in a position of trust. He or she is charged with managing the assets of a corporation honestly and in a manner that is consistent with the objects of the corporation. Courts will be loath to interfere with the legitimate exercise of corporate duties, but they will intervene where a fiduciary breaches the trust reposed in him or her.

[46] Mr. McGoey's fiduciary duties included an obligation to act in good faith and in the best interests of the corporation. He had a specific obligation to scrupulously avoid conflicts of interest with the corporation and not to abuse his position for personal gain: *Peoples Department Stores Inc. (Trustee of) v. Wise,*

2004 SCC 68, [2004] 3 S.C.R. 461, at paras. 35 and 42; and *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at paras. 39 and 89.

[47] As Granger J. stated in *Moffatt v. Wetstein* (1996), 29 O.R. (3d) 371, at p. 390 (Gen. Div.):

> Subsumed in the fiduciary's duties of good faith and loyalty is the duty to avoid a conflict of interest. The fiduciary must not only avoid a direct conflict of interest but must also avoid the appearance of a possible or potential conflict. The fiduciary is barred from dividing loyalties between competing interests, including self-interest.

[48] Disclosure of a directors' interest in a transaction is just the first step. Disclosure does not relieve a director of his or her obligation to act honestly and in the best interests of the corporation: *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.), aff'd (2004), 183 O.A.C. 310 (C.A.).

[49] It is against these standards that the trial judge was obliged to consider the actions of Mr. McGoey.

SAR Cancellation Awards

[50] With respect to the SAR Cancellation Awards, the trial judge concluded that there was no evidence as to how the UBS Board arrived at the non-market price of $0.40 per unit and how it determined that it was in the best interests of

the corporation. The UBS Board provided no credible analysis to justify why they considered that these payments, which represented a significant percentage of UBS market capitalization, were fair and reasonable in the circumstances.

[51] In considering the reasonableness of the UBS Board's actions in this regard, I find that the following facts are germane.

[52] As of May 4, 2009, when the UBS Board resolved to treat the Spectrum Sale as a triggering event pursuant to the SAR Plan, it anticipated that the trading price of UBS shares would rise from $0.15 to a range of $0.30 to $0.50 per share.

[53] On June 17, 2009, the shares of UBS were still trading at $0.15 per share. Thus, the anticipated gains between the strike price and the trading price had not materialized. It was in these circumstances that the UBS Board decided to implement the SAR Cancellation Awards without the benefit of any independent or third party advice that could speak to the reasonableness of their decision.

[54] As found by the trial judge, the potential Rogers share transaction never went beyond the negotiation stage and was completely off the table by July 20, 2009 and could not serve as a justification for the $0.40 unit price.

[55] Mr. McGoey's SAR Cancellation Award was allocated to him on August 28, 2009, pursuant to which he was entitled to receive a payment from UBS of

$600,000, whereas, under the SAR Plan, he would have been entitled to a payment of $75,000.

[56] Given these facts, and in the absence of any credible evidence regarding the *bona fides* of the SAR Cancellation Awards or the process by which they were created, the trial judge reached the reasonable conclusion that the decision to implement the new scheme was driven by UBS Board's self-interest. I see no error in that conclusion.

[57] I also agree with the trial judge's conclusion that the $0.40 unit value was unjustified and unrealistic. It was notionally based on a transaction with Rogers that was far from certain and which had been terminated at the time when the SAR Cancellation Awards were allocated. What the SAR Cancellation Awards really achieved was the removal of the uncertainty that was part of the SAR Plan. Under this new scheme, the recipients' awards were not dependant on an increase in the share price, the awards would be granted regardless of the trading price of the shares. This removal of the uncertainty was to the benefit of the recipients and was of no benefit to the corporation.

Bonus Pool

[58] The trial judge rejected the position of Mr. McGoey that there was a reasonable rationale for the establishment of the Bonus Pool and his allocation of

$1.2 million. This finding was well supported by the evidence at trial, including the following.

[59] The UBS Board did not seek or receive any expert advice on an appropriate bonus structure. Nor did they have any comparable or other data regarding executive compensation in the marketplace.

[60] There was no documentation that stipulated the performance factors or criteria by which Mr. McGoey's performance would be evaluated. The trial judge rejected Mr. McGoey's evidence that the services he provided for Look qualified as the criteria under which he could be awarded a bonus by UBS. She concluded that, when the UBS bonus was awarded, there were, in fact, no criteria.

[61] Similarly, there was no documentation that showed how the Bonus Pool was quantified. The best evidence we have is that Mr. McGoey went to a UBS Board meeting seeking to establish a $7 million bonus pool but the UBS Board found that amount "too high" and established a $3.4 million bonus pool instead.

[62] In my view, on these facts, the trial judge was correct to conclude that Mr. McGoey's establishment of the Bonus Pool and the allocation of a part of the Bonus Pool to him breached his fiduciary duties to UBS.

Defences

[63] I do not accept Mr. McGoey's rather novel argument that there can be no finding of a breach of fiduciary duty because, before he could be paid under the SAR Cancellation Awards or the Bonus Pool, he was removed from office by the shareholders of UBS. Counsel for Mr. McGoey suggests that the breach is incomplete because no damages have been suffered.

[64] This submission is not correct at law. As stated by Mark Ellis in his text, *Fiduciary Duties in Canada*,[2] in the context of a discussing conflicts of interest:

> Entering into a *potential* conflict of interest is a breach whether or not the conflict is operative; once such a conflict becomes operative to jeopardize the beneficiary or his property, the fiduciary breach would then give rise to the remedies available in law. The point is important: to wait until damage or prejudice actually occurs is to prejudice the beneficiary's right to utmost loyalty and avoidance of conflict. If such a schism in theory is allowed, the law would be encouraging a finding that the duty "piggy-backs" the damage caused rather than premising damage on the basis of duty. [Emphasis in original.]

[65] Similarly, in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 553, McLachlin J. (as she then was) stated that "[a] breach of fiduciary duty is a wrong in itself, regardless of whether a loss can be foreseen".

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[2] Mark Ellis, *Fiduciary Duties in Canada*, loose-leaf (consulted on 25 June 2014), (Carswell, Toronto: 2014), ch. 1 at 5.

[66] It would be a remarkable result if a fiduciary could be allowed to act in a manner contrary to his duty with impunity, on the basis that he was prevented by the beneficiary's vigilance from receiving a personal benefit.

[67] Mr. McGoey's counsel also argued that the trial judge erred in simply comparing the payments under the SAR Plan and the SAR Cancellation Awards, without considering that the SAR Cancellation Awards also required the recipients to execute releases and were contingent upon Look receiving the full payment of funds from the Spectrum Sale and UBS having sufficient resources.

[68] I do not find this argument persuasive. The last payment under the Spectrum Sale was received on September 11, 2009. Mr. McGoey's release was executed four days later. It is true that the funds from the Spectrum Sale had not been paid over to UBS; however, it was hardly a doubtful proposition that the money would have found its way to UBS, given Mr. McGoey and his associates' control over Look's board.

[69] The trial judge also rejected Mr. McGoey's argument that his actions were undertaken with the assistance of independent legal advice from Mr. McCarthy and, therefore, could not constitute a breach of his fiduciary duties. I agree with the trial judge's conclusion on this issue. The UBS Board never sought an opinion from Mr. McCarthy regarding the reasonableness of the changes to the SAR Plan and the bonuses. Indeed, the evidence is clear that Mr. McCarthy did

not have any information during the relevant time regarding the quantity of the Bonus Award or the SAR Cancellation Awards allocated to Mr. McGoey or to any other director or officer of UBS.

[70] Finally, the trial judge carefully considered Mr. McGoey's argument that his actions were protected by the business judgment rule. She reviewed the law and identified the critical issue at para. 122 of her reasons:

> 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.

[71] The trial judge properly concluded that the business judgment rule was of no assistance to Mr. McGoey because he did not satisfy the rule's preconditions of honesty, prudence, good faith, and a reasonable belief that his actions were in the best interests of the company*: Corporacion Americana de Equipamientos Urbanos S.L. v. Olifas Marketing Group Inc.*, (2003), 66 O.R. (3d) 352, at paras. 13 and 14 (S.C.).

[72] It must be remembered that the business judgment rule is really just a rebuttable presumption that directors or officers act on an informed basis, in good faith, and in the best interests of the corporation. Courts will defer to business decisions honestly made, but they will not sit idly by when it is clear that a board is engaged in conduct that has no legitimate business purpose and that is in breach of its fiduciary duties. In the present case, there was ample evidence

upon which the trial judge could base her conclusion that the presumption had been rebutted.

[73] In summary, I conclude that the trial judge did not err in finding that Mr. McGoey breached his fiduciary duties to UBS.

(ii) Eligibility for Indemnification

[74] The trial judge noted that UBS' indemnity obligations arise under various sources and documents: the Jolian Management Services Agreement; Article 7 of the UBS by-laws; specific indemnity agreements between Mr. McGoey and UBS; and s. 134(4.1) of the *OBCA*.

[75] The trial judge also referred to Marrocco J.'s finding that the indemnification provisions under the UBS by-laws are "only available if the director or officer acted honestly and in good faith with a view to the best interests of the Corporation": at para. 183.

[76] The trial judge concluded that, given her finding of a breach of fiduciary duty, the indemnity obligations were not operative.

[77] I see no error in this finding. The purpose of statutory and contractual indemnity provisions is to ensure that officers and directors who are acting in good faith and in the best interests of a corporation are not exposed to legal costs. It is commercially sensible and good public policy to offer this protection.

The rationale for offering the protection is eliminated, however, where the officer or director has not acted in good faith and in the best interests of the corporation.

[78] In a related case, this court upheld an application judge's decision to refuse advanced funding for the legal costs of Look's directors and officers because the corporation had established a strong *prima facie* case of bad faith on the part of the parties seeking the funding: *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 116 O.R. (3d) 241, leave to appeal refused, [2013] S.C.C.A. No. 377.

[79] In the present case, while the trial judge did not specifically state that Mr. McGoey acted in bad faith, she did conclude that he was ineligible to receive indemnification because he had not met the standard of acting honestly and in good faith. This decision was open to the trial judge to make on the evidence before her and there is no basis for appellate interference.

(iii) Interpretation of the Jolian Management Services Agreement

[80] The trial judge held that, pursuant to the terms of the Jolian Management Services Agreement, a breach of fiduciary duty did not constitute "Cause" or a "Jolian Default" as defined in the agreement, and, consequently, Mr. McGoey was entitled to receive Enhanced Severance. However, this payment was to be calculated on the basis of what the entitlement would have been prior to the SAR Plan cancellation and the establishment of the Bonus Pool.

[81] Mr. McGoey and Jolian were directed to file a revised proof of claim within 30 days to reflect the trial judge's finding. The revised claim filed pursuant to this direction was in excess of $4 million.

[82] For the reasons that follow, I am of the view that the trial judge erred in law in her interpretation of the Jolian Management Services Agreement and in her finding that Mr. McGoey was entitled to Enhanced Severance under the contract. Set forth below, I consider some general principles of contractual interpretation, the specific terms of the Jolian Management Services Agreement, and the trial judge's analysis of the agreement.

General Principles

[83] The following principles of contractual interpretation are relevant in considering the trial judge's analysis of the Jolian Management Services Agreement.

[84] In *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, at pp. 439-40, quoting Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d. ed. (Toronto: Butterworths, 1994), at p. 131, L'Heureux-Dubé J., dissenting, described the interpretation of statutes in the following way that applies equally to contractual interpretation:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of [that which is to be judicially interpreted] in its *total context*, having regard to [its] purpose ..., the *consequences of*

> *proposed interpretations,* the *presumptions and special rules of interpretation,* as well as *admissible external aids.* In other words, the *courts must consider and take into account all relevant and admissible indicators of [...] meaning. After taking these into account, the court must then adopt an interpretation that is appropriate.* An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the [...] text; (b) its efficacy, that is, its promotion of the [...] purpose; and (c) its acceptability, that is, the outcome is reasonable and just.
>
> [Emphasis added by L'Heureux-Dubé J.]

[85] The subjective intent of one party to a contract "has no independent place" in interpreting contractual provisions: *Eli Lilly & Co. v. Novopharm Ltd.,* [1998] 2 S.C.R. 129, at para. 54.

[86] While the plain meaning of the words used by the contracting parties is important, the contract must be read as a whole and in the context of the circumstances as they existed when the contract was created: *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59, 85 O.R. (3d) 616, at para. 52.

[87] Courts will avoid a contractual interpretation which results in rendering the agreement unlawful. As Blair J.A. discussed in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254, at para. 57, quoting John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005),

at p. 729,[3] "where an agreement admits of two possible constructions, one of which renders the agreement lawful and the other of which renders it unlawful, courts will give preference to the former interpretation"; see also *Cantor Art Services Ltd. v. Kenneth Bieber Photography Ltd.*, [1969] 1 W.L.R. 1226 (C.A.).

[88] A commercial contract will be interpreted in a manner that is consistent with commercial principles and that avoids a commercial absurdity. In *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at p. 901, Estey J. stated:

> [w]here words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

[89] As stated by the House of Lords in *Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.,* [1997] 2 W.L.R. 945, at p. 964 (H.L.), commercial contracts should be "interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language".

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[3] See also John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2012), at p. 773.

[90] The interpretation of a contract is a question of law. Accordingly, the standard of review by an appellate court is correctness: *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81.

Jolian Management Services Agreement

[91] UBS and Jolian entered into the Jolian Management Services Agreement in 2006. However the terms of the agreement were not disclosed to UBS shareholders until May 2010, when it was filed on SEDAR.

[92] The relevant sections of the agreement are as follows:

> "**Cause**" means an act of fraud, embezzlement or misappropriation or other act which constitutes "Cause" at common law, and, in each case, which is materially injurious to the Company.
>
> "**CEO Designee**" means Gerald T. McGoey or such other individual designated by the parties in conformity with Section 1.3 of this Agreement.
>
> "**CEO Services**" means the duties typically performed by, and responsibilities assumed by the chief executive officer of a company, including, without limitation, the overseeing of:
>
> (a) the preparation and administration of the annual budget;
>
> (b) the hiring, firing and supervising of all senior staff;

> (c) UBS' compliance with all regulatory requirements and shareholder communication;
>
> (d) the monitoring and, where appropriate, the updating of UBS' broadcast and information technology; and
>
> (e) customer service.
>
> ...
>
> **"Jolian Default"** 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 USB or which has not been waived by UBS.

Interpretation by the Trial Judge

[93] The trial judge's analysis of the Jolian Management Services Agreement was limited to considering the term "Jolian Default". After setting out the definition of that term found in the agreement, the trial stated, at paras. 172-77:

> 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.
>
> 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.
>
> 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.
>
> It also would have been an easy matter for the drafters to define "cause" simply as "cause at common law". They did not.
>
> 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.
>
> In any event, since 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.

[94] In my view, the trial judge erred in law in her interpretation of the agreement for the following reasons.

[95] First, the trial judge's interpretation of the agreement ignores the provisions of s. 134(3) of the *OBCA*. That section provides:

> Subject to subsection 108(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act and the regulations or relieves him or her from liability for a breach thereof.

[96] Pursuant to s. 134(1) of the act, a director or officer of an *OBCA* corporation is required to act honestly and in good faith with a view to the best interests of the corporation. In addition, the director or officer must exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.

[97] The effect of the trial judge's interpretation is to eviscerate the prohibition found in s. 134(3). If her interpretation were accepted, Mr. McGoey would be relieved of his obligation to act in manner that is consistent with his duties under the legislation (*i.e.* he could breach his fiduciary duties to the company). Such conduct would not constitute a "Jolian Default" under the agreement and he would be entitled to receive Enhanced Severance.

[98] Second, the trial judge's interpretation of the Jolian Management Services Agreement leads to a commercially absurd result. Given her finding that subparagraphs (a) and (b) are conjunctive, Mr. McGoey could commit theft from the company but such conduct would not constitute a "Jolian Default" under the agreement unless UBS gave Mr. McGoey written notice of the theft and provided him with the opportunity to cure the fraud.

[99] Clearly this type of result could not be consistent with the intentions of reasonable business people entering into a commercial transaction. While the word "and" generally imports a conjunctive sense, this is not an inexorable

cannon of construction. In some cases the word "and" will be interpreted as "or", in order to make sense and give effect to the contract: *Clergue v. H.H. Vivian and Co.*, (1909) 41 S.C.R. 607; and *Boy Scouts of Canada v. Doyle* (1997), 149 D.L.R. (4th) 22 (Nfld. C.A.). This was one of those cases.

[100] Third, the trial judge's interpretation of the agreement has the effect of ignoring the phrase "or other act which constitutes 'Cause' at common law". If the intention of the parties was to limit the prohibited conduct to the enumerated grounds of fraud, theft, or misappropriation, this additional phrase would be unnecessary.

[101] When the contract is read as a whole, it is evident that the parties sought to ensure that a "Jolian Default" would be limited to serious misconduct that was materially injurious to UBS. The enumerated grounds of fraud, theft and misappropriation are examples of the types of conduct which would constitute a default.

[102] A serious breach of fiduciary duty would logically meet this definition, as it would constitute a breach of Mr. McGoey's statutory and common law duties to the corporation and would amount to cause at common law. The conduct of Mr. McGoey, in establishing the SAR Cancellation Awards and the Bonus Pool and thereby preferring his own interests to the interests of UBS, qualifies as a serious breach of fiduciary duty.

[103] Given the amount of money involved in the SAR Cancellation Awards and the Bonus Pool, these plans would have been materially injurious to UBS had the payouts been made. Again, in my view, the fact that Mr. McGoey was prevented by shareholder vigilance from receiving the funds allocated to him cannot serve as a defence. It would be commercially absurd to interpret the agreement to mean that UBS would be obligated to pay Jolian and Mr. McGoey an amount equivalent to 300% of Mr. McGoey's compensation because he had not succeeded in wrongfully diverting funds for his own benefit.

[104] Interpreting "Jolian Default" to include a serious breach of fiduciary duty that was materially injurious to UBS, gives effect to the entirety of the words used in the definition of the term in their context. It is also commercially sensible and does not result in an interpretation that is inconsistent with the *OBCA*.

[105] The trial judge erred in law in her contractual interpretation, and her finding that Mr. McGoey was entitled to Enhanced Severance cannot stand.

(iv) Oppression Remedy

[106] Given my finding regarding the proper interpretation of the Jolian Management Services Agreement, it is not necessary to consider UBS's argument that the trial judge erred in failing to consider the oppression remedy argument advanced by UBS. I only note that the trial judge, having concluded that Mr. McGoey was entitled to receive Enhanced Severance, had an obligation

to consider the oppression argument. Contrary to her conclusion, the setting aside of the SAR Cancellation Award and the Bonus Award did not cure Mr. McGoey's wrongful conduct. It was still necessary to determine whether the entitlement to Enhanced Severance was oppressive.

[107] The oppression remedy is a flexible, equitable remedy that affords the court broad powers to rectify corporate malfeasance. It is an important remedy for shareholders and other corporate stakeholders. In the circumstances of this case, it may well have provided a remedy to protect the interests of the shareholders.

[108] It was an error in law not to consider the oppression remedy in these circumstances.

DISPOSITION

[109] I would allow the appeal and substitute paragraph 2 of the judgment with a finding that Mr. McGoey's actions constitute "Cause" and a "Jolian Default" under the Jolian Management Services Agreement, set aside paragraph 3 of the judgment, and substitute paragraph 4 of the judgment with a finding that Jolian/Mr. McGoey are not entitled to Enhanced Severance. I would dismiss the cross-appeal.

[110] On the issue of costs of the trial, the trial judge's decision that there be no order as to costs was premised on her finding that both parties had achieved

some measure of success at trial. Given my findings, the costs order cannot stand. As the successful party, UBS is entitled to costs of the trial. If the parties cannot agree on the scale and/or quantum of the costs, they may attend before the trial judge to fix the costs.

[111] The parties agreed that, if one party were successful on both the appeal and the cross appeal, then that party would be entitled to costs of the appeal in the amount of $60,000. Accordingly, I would order that Mr. McGoey and Jolian are jointly and severally liable to UBS for the costs of the appeal in the amount of $60,000, inclusive of fees, disbursements, and H.S.T.

Released: RJS JUL 10 2014

JA

I agree Robert J. Sharpe JA.

I agree. R.P. Juriansz JA