COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hawkes v. Levelton Holdings Ltd.,*
2013 BCCA 306

Date: 20130628
Docket: CA040236

Between:

Darryl Hawkes

Respondent
(Plaintiff)

And

Levelton Holdings Ltd. and Levelton Consultants Ltd.

Appellants
(Defendants)

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Hinkson

On appeal from: A decision from the Supreme Court of British Columbia, dated August 15, 2012 and December 12, 2012, (*Hawkes v. Levelton Holdings Ltd*., 2012 BCSC 1219 and 2012 BCSC 1968, Vancouver Docket S108241)

Counsel for the Appellant: S. Brearley

Counsel for the Respondent: D.S. Boyle

Place and Date of Hearing: Vancouver, British Columbia
May 17, 2013

Place and Date of Judgment: Vancouver, British Columbia
June 28, 2013

Written Reasons by:
The Honourable Mr. Justice Hinkson

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[1] The appellant Levelton Consultants Ltd. ("Consultants") is wholly owned by the appellant Levelton Holdings Ltd. ("Holdings"). The respondent was employed as a professional engineer by Consultants or its predecessors for a period of 18 years. He also became a shareholder in Holdings during the period of his employment, and remained so until his employment was terminated without notice on November 22, 2010.

[2] After a ten day trial, the trial judge found that the respondent had been wrongfully dismissed and awarded him damages, including the value of his shares in Holdings at the end of what she found was a reasonable period of notice for his termination without cause. Her reasons for judgment are dated August 15, 2012, and are indexed at 2012 BCSC 1219. Supplemental reasons for judgment were issued on December 12, 2012, and are indexed at 2012 BCSC 1968.

[3] The appellants appeal the award of damages relating to the respondent's benefits as a shareholder of Holdings. The respondent cross appeals the value assigned by the trial judge to his shares in Holdings.

Background

[4] The respondent joined a predecessor of Consultants in 1992, thereafter working for it, and then for Consultants, until his termination in 2010. I will refer to Consultants and its predecessors collectively as Consultants for ease of reference. Throughout his employment with Consultants, the respondent had no written contract.

[5] During his career with Consultants, the respondent progressed to manager of his working group in 1997, director of the board from 1999 to 2004, and manager of his division in 2005 and 2006.

[6] Following a change in the presidency of Holdings in 2005, the respondent was informed that he would be removed as manager of Consultants' geotechnical

division. He agreed to continue thereafter as an employee of Consultants as a senior project manager in a different company office than the one where he had been working, moving in June 2007. From 2007 to 2009 the respondent's performance reviews indicated that he was meeting or exceeding Consultants' expectations.

[7] Consultants' professional employees were entitled to purchase shares in Holdings and the respondent did so. He began purchasing shares in Holdings in 1995 and continued to accumulate shares until 2004.

[8] The benefit to Consultants' employees of also being shareholders of Holdings was described by the trial judge as participation in the profits in Consultants not as dividends, but rather as bonuses based on a profit distribution formula set by Holdings' Board.

[9] At paras. 258 - 259 of her reasons, the trial judge found that:

> [258] Employees of Consultants who were also shareholders of Holdings received an annual bonus. The bonus was added to the employee's salary at Consultants.
>
> [259] The bonus was a way of distributing profits and rewarding performance. Holdings did not issue dividends.

[10] The bonus pool available to distribute to those who were both shareholders and employees was determined annually by the management of Holdings. Once the bonus pool was calculated, it would be distributed on a per person basis in accordance with the following formula:

a) 35% of a bonus pool was to be distributed on the basis of the number of shares held by a shareholder;

b) 15% of the bonus pool was distributed on an equal basis; and

c) 50% would be distributed to shareholders based on management's assessment of that person's performance as an employee that year.

[11] The respondent's share of the bonus pool was $167,220.00 in 2007; $132,815.00 in 2008; and $86,877.00 in 2009.

[12] Pursuant to Holdings' "Shareholders Buy/Sell Agreement" (the "BSA"), the respondent's ability to maintain his status as a shareholder was subject to his continued employment with Consultants; sections 10.1 and 10.2 of the BSA provide that Holdings' right to buy back the shareholder's shares will be "triggered" in the event that he or she ceases to be an employee of, *inter alia*, Consultants.

[13] The respondent's employment with Consultants was terminated on November 22, 2010. The respondent asked that the decision to terminate him be reconsidered by Consultants, but its management refused to do so. The respondent then wrote to the board of Holdings to ask that it reconsider his termination, but was advised that Holdings would not interfere with the decision.

[14] Pursuant to s. 15.9 of the BSA, any party that refuses to fulfill any of its obligations under the BSA is deemed to irrevocably appoint a representative of Holdings to act on that party's behalf.

[15] On December 3, 2010, the respondent sent a notice to the appellants, purporting to revoke their authority to act on his behalf pursuant to that section. Holdings replied by letter dated December 7, 2010, stating its view that the revocation was not effective.

[16] On December 15, 2010, Holdings sent the respondent a letter which referred to "the issue of [him] continuing to be a shareholder of [Holdings]" and stated that he was a defaulting shareholder under the BSA. Holdings further stated that it was therefore initiating the process mandated by the BSA which required the respondent to sell all of his shares.

[17] On December 16, 2010, Holdings advised the respondent that the closing date for the purchase and sale of his shares would be December 22, 2010.

[18] The respondent filed a notice of civil claim on December 16, 2010.

[19] On December 20, 2010, a notice of triggering event pursuant to the BSA was sent to the respondent by Holdings. The respondent took the position that Holdings had repudiated the terms of the BSA, and thus could not rely upon its provisions.

[20] On December 21, 2010, and June 29, 2011, the respondent obtained injunctions from the Supreme Court, precluding the appellants from dealing with his shares.

The Findings of the Trial Judge

[21] The trial judge set out the issues she intended to resolve at para. 8 of her reasons for judgment:

> 1. Was the plaintiff dismissed from his employment without just cause?
> 2. If the plaintiff was wrongfully dismissed without notice, did he fail to mitigate his damages?
> 3. If the plaintiff was wrongfully dismissed without notice, what is the measure of his damages?
> 4. Was the termination of the plaintiff's employment oppressive or unfairly prejudicial to him as a shareholder within the meaning of the [*Business Corporations Act*, S.B.C. 2002, c. 57] BCA, and if so**,** what remedy is appropriate?
> 5. Did the defendants by counterclaim, Mr. Robert Bourne and Elite Sports Management, act together with the plaintiff to deliberately deceive Consultants for the sole purpose of obtaining a financial benefit to the detriment of Consultants, in respect of the submission of receipts for the 2008 and 2010 hockey camps, and if so, is Consultants entitled to damages in respect of the $7,035 it paid to the plaintiff to reimburse him in respect of those hockey camps?

[22] At paras. 28 and 216 of her reasons, the trial judge found:

> [28] Here it is common ground that there was no written contract of employment. In such circumstances, the law ordinarily implies certain terms of employment: first, that the employer is entitled to dismiss an employee, even without cause; second, if the dismissal is without cause, the employee is entitled to reasonable notice: *Machtinger v. HOJ Industries Ltd*, [1992] 1 S.C.R. 986 at p. 997-998. It is well-accepted that the employer has the burden of proving just cause for an employee's dismissal when the dismissal

> is without notice: *Horvath v. SAAN Stores Ltd*., 2003 BCSC 1845, at para. 2, *Nowlan v. Midland Transport* (1996), 174 N.B.R. (2d) 81 (C.A.) at para. 17.
>
> …
>
> [216] Normally the law implies in an indefinite and unwritten employment contract an implied term that the employment can be terminated on reasonable notice to the employee: *Bardal v. Globe & Mail* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at p. 143. I will approach the damages issue on that basis.

[23] The trial judge found that the appellants had not established cause for the respondent's termination. No appeal is taken from this finding.

[24] Having considered the respondent's circumstances, including his age, professional qualifications, salary, equity ownership and seniority, the trial judge determined at para. 237 that a reasonable period of notice of dismissal was 18 months. No appeal is taken from this finding.

[25] The trial judge found that at the time of his termination, the respondent was earning an annual salary of $116,500.00. She also found that he began employment at a higher salary with another engineering firm on December 5, 2011, and after deducting other income he had received, quantified his damages for lost salary at $107,900.00, together with $3,600.00 for lost vehicle allowance.

[26] The trial judge also found that the respondent had not failed to mitigate his damages. No appeal is taken from this finding.

[27] The trial judge then addressed the respondent's claim for lost benefits as a shareholder of Holdings. At paras. 247 and 248 of her reasons, she observed:

> [247] The most contentious aspects of Mr. Hawkes' claim for damages for wrongful dismissal, outside of the calculation of the notice period, are his claim for a portion of the annual bonus paid to shareholder-employees and his claim for the loss of the value of his shares in Holdings. He claims damages for the loss of these benefits through the 18-month period of reasonable notice of dismissal.
>
> [248] Both of these categories of damages, loss of bonus and loss of increased share value, are conceptually similar. They raise issues as to whether certain benefits Mr. Hawkes enjoyed as a shareholder would have continued during the period of reasonable notice of termination of his employment contract.

[28] The trial judge concluded at paras. 255−256 of her reasons that:

> [255] I have come to the conclusion that it was an implied term of Mr. Hawkes' employment contract that he would be entitled to share in the benefits accruing to shareholders, both bonuses and any increases in share value, during a period of reasonable notice of termination of employment.
>
> [256] I have reached this conclusion based on an examination of first, the intertwined nature of the employment and shareholder relationship, and second, an analysis of the written shareholders agreement itself.

[29] In discussing the intertwined employee-shareholder relationship, the trial judge found at paras. 263−269 of her reasons:

> [263] The whole bonus payment structure was based on the employment and shareholder positions being intertwined: the bonus was not a dividend but was paid by way of salary, and involved components related to the employee's shareholdings as well as related to on-the-job performance. The bonus components related to the employee's shareholdings were objectively measured in the sense that they simply involved a calculation based on the shares held; the component related to performance was more subjectively measured. But both bonuses were non-discretionary bonuses given to Mr. Hawkes because he was both an employee and a shareholder, just as other shareholder-employees received the same benefits.
>
> [264] Also illustrative of the intertwined nature of the employment and shareholder relationship is the fact that a person could not simply purchase shares in Holdings. Rather, the person had to be an eligible employee of Consultants. The determination of eligibility to purchase shares was very much tied into the person's status and performance as employee. The Board of Holdings repeatedly set out that in making such decisions the Board considered such criteria as the person's demonstrated business acumen, management skills, ability to bring in work, and technical expertise. These are qualities that were only apparent as employee qualities, not shareholder qualities.
>
> [265] Once an employee was approved to purchase shares in Holdings, he could not transfer those shares to another employee unless it was approved by the Board.
>
> [266] The share price was not determined by market value or other market forces, but by management of the firm.
>
> [267] The employee-share ownership program was also seen as a good management tool in the interests of the long-term health of the operating business, Consultants: it encouraged older employees to pass on the legacy of their engineering practices and it encouraged younger employees to stay with the firm.
>
> [268] Thus, the right to own shares in Holdings, and thereby receive the related bonus benefits, was clearly earned by being a good employee of Consultants. The opportunity to purchase shares was a reward for employment performance. It follows that it was an implied term of the

> employment contract between Levelton and its employee-shareholders that the employee would enjoy all benefits normally accruing to him as shareholder based on the shares he held, during the full term of the employment relationship.
>
> [269] I find that the only reasonable interpretation of the combined shareholder-employee relationship is that it was an implied term of the employment contract that if the employee received notice of termination of employment, he would continue to receive all the benefits of employment and of his shareholdings during the period of reasonable notice.

[30] Having concluded that the respondent was entitled to these benefits during the reasonable notice period, the trial judge next considered whether there was any express term in the BSA overriding the implied term of the employment contract she had found.

[31] Clause 10.1(g) of the BSA sets out the circumstances which constitute a "triggering event" as follows:

> 10.1 Causes of Triggering Event
>
> Any of the following shall constitute a Triggering Event:
>
> ...
>
> (g) if a Shareholder ceases to be an employee of the Company or any Subsidiary for any reason other than for cause.

[32] Clause 10.2 of the BSA provides:

> On the occurrence of a Triggering Event by a Shareholder, the Board shall notify that Shareholder (the "Triggering Shareholder") or in the case of 10.1(a), the Triggering Shareholder's personal representative, or such other person as the Board determines of such Triggering Event, and such notice will set out the Company's intent to purchase the shares of the Triggering Shareholder in accordance with Section 12.0 (Buy-Sell Procedure).

[33] When Mr. Hawkes was dismissed, Consultants took the position that he was dismissed for cause, and so did not give a clause 10.2 notice of triggering event to him.

[34] Section 12.2(a) and (c) of the BSA state:

> 12.2 Triggering Event
>
> (a) On the occurrence of a Triggering Event and service of notice pursuant to Paragraph 10.2, the Company shall cause the Shares (the "Triggered Shares") owned by the Triggering Shareholder to be offered for sale ...
>
> ...
>
> (c) If any Triggered shares are not purchased by existing or new Shareholders within thirty (30) days of the Triggering Event, the Company shall purchase the remaining Triggered Shares;

[35] Section 12.2(e) of the BSA provides in part that "all transactions of Triggered Shares between the Triggering Shareholder and other Shareholders shall be completed within sixty (60) days of the Triggering Event as determined by the Board".

[36] The trial judge concluded at paras. 289−291:

> [289] The language of clause 10.1(g) of the BSA on its own does not support the position that the parties intended such language to mean that if the shareholder-employee was terminated without cause and without reasonable notice, he would be precluded from claiming as his damages the loss of the benefits he would have earned as shareholder-employee during the reasonable notice period.
>
> [290] The BSA made it clear that a shareholder had to be an employee. I have already found that the two roles were intertwined. Clearly the BSA did not address every term of employment and so there was an implied employment contract that co-existed with the shareholders agreement. Of necessity, the defendants are relying on the implied term of employment that an employer can terminate an employee without cause.
>
> [291] As mentioned earlier, another standard implied term of employment is that an employer must give reasonable notice before terminating an employee's contract of employment without cause. The terms of the BSA did nothing to address or override this implied term of employment. To the contrary: the defendants expressly incorporated into the BSA terms of an earlier agreement which on its face clearly did not provide for termination without notice and without cause. They did so by virtue of a memorandum dated May 25, 2009.

[37] At paras. 307−309 of her reasons, the trial judge found:

> [307] Clause 10.1(g) of the BSA does not expressly state that if a shareholder is dismissed from his employment without cause and without

> reasonable notice, he is, for purposes of any damages claim in relation to breach of his employment contract, considered to have ceased to be an employee as of the date of his dismissal as opposed to as of the date of the expiry of reasonable notice. If that was the meaning, it would provide an incentive to Levelton to treat its employee-shareholders unfairly. For example, in event of an economic downturn and consequential need to reduce staff by dismissing employees without cause, Levelton would have the incentive to fire employee-shareholders unlawfully, in breach of contract, without notice, so that it could avoid having to pay out the bonuses already earned by those employees as shareholders but not yet distributed, or which could have been earned over the contractual notice period. That would be manifestly unfair and not in accord with the intentions and expectations of the Levelton employee-shareholder group.
>
> ***Conclusion on Interpretation of the BSA***
>
> [308] I find that had the defendants not breached Mr. Hawkes' contract of employment, Mr. Hawkes would have continued in his employment for 18 months after receiving reasonable notice of his dismissal. Given that his employment would not have ceased during this time, clause 10.1(g) of the BSA would not have applied and there would have been no triggering event to cause the sale of his shares until after his employment did actually cease 18 months later.
>
> [309] As damages flowing from the breach of the employment contract, Mr. Hawkes is therefore entitled to compensation for the loss of the opportunity to share in whatever pecuniary benefits flowed from being a shareholder during that 18 month notice period. This conclusion is in keeping with the analysis of the Court of Appeal in *Saalfeld* [*v. Absolute Software Corp*., 2009 BCCA 18] at paras. 33 and 42.

[38] Based upon her analysis, the trial judge found that the respondent was entitled to damages related to the loss of his right to participate in the share pool and equal pool portions of the bonus pool to the end of the 18 month notice period. She assessed this entitlement for the relevant part of 2010 as a distribution of $53,984.00 in relation to the share pool and $11,270.00 in relation to the equal pool, for a total of $65,254.00; for 2011 a total of $65,254.00; and for the relevant part of 2012 a total of $27,189.00. The total damages in relation to the respondent's lost share of the share pool and equal pool were assessed at $157,697.00.

[39] Insofar as the performance pool part of the bonus pool, the trial judge found that but for his wrongful termination, the respondent would have continued to perform well, and therefore would have earned a performance bonus during the notice period in the amount of $64,733.00.

[40] As the bonus pool payments were calculated and paid in the year following that in which they were earned, for tax reasons, some of the bonus pool amounts were distributed as salary in the year calculated and some were paid to a related company and treated as a shareholder loan to that company by the employee-shareholder. There was then a process in subsequent years when the shareholder loan would be "repaid" to the employee-shareholder together with interest at the rate of 1% over the average Bank of Montreal prime rate. Holdings conceded that they owed this amount to the respondent.

[41] The respondent's shareholder loan account stood at $58,581.67 as of December 31, 2011. The trial judge ordered that Holdings should pay this amount, together with interest to the respondent.

[42] At the time of the respondent's dismissal, shares in Holdings were valued at $228.05. By May 2011, the shares were valued at $404.70. Holdings management had an intention for 2012 to have the share price reach the price which had been proposed in 2010 i.e., $431.13.

[43] At paras. 352−353 the trial judge reasoned that:

> [352] Had Mr. Hawkes been given reasonable notice of the termination of his employment, he would have continued as an employee-shareholder until roughly the end of May 2012, and only then would his employment and all related benefits end, including the benefit of owning shares. Thus only then would he have been required to sell his shares.
>
> [353] Therefore, if the employer's breach of the employment contract would have caused him to sell his shares (as Levelton claims it did), it would have caused Mr. Hawkes to suffer damages equal to the difference in share price as between his actual dismissal and what would have happened had he had to sell his shares at the end of the period of reasonable notice.

[44] In the result, the trial judge valued the respondent's shares for the calculation of his damages for their forced sale at $431.13, subject to her findings with respect to the respondent's claim for an oppression remedy.

[45] The trial judge concluded that the appellants' attempt to deny the respondent the benefits he would have received as shareholder during a period of reasonable

notice of termination of employment (his bonuses and the increase in share value) might constitute oppressive or unfairly prejudicial conduct, contrary to s. 227(2) of the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*BCA*"), but as she had already provided remedies for those wrongs in the wrongful dismissal aspect of his claim, declined to award further remedies for oppression.

[46] At paras. 396−397 the trial judge concluded:

> [396] Thus I find that the manner in dealing with Mr. Hawkes' dismissal and the corresponding attempt to deny him the benefits he would have been entitled to as a shareholder during a period of reasonable notice, was unfairly prejudicial to him as a shareholder, within the meaning of s. 227(2)(b) of the *BCA*.
>
> [397] Were this relief not duplicative of the relief I have ordered in respect of the wrongful dismissal damages, I would conclude that it would be appropriate to fashion a remedy pursuant to s. 227(3) of the *BCA*, directing Holdings to cause the payment of the bonuses to Mr. Hawkes that I have already assessed as due to him during the period of reasonable notice, and directing Holdings to purchase his shares at a price of $431.13 per share.

[47] The appellants advanced a counterclaim at trial. They argued that the defendants by counterclaim, Mr. Robert Bourne and Elite Sports Management, acted together with the respondent to deliberately deceive Consultants for the sole purpose of obtaining a financial benefit to the detriment of Consultants, in respect of the submission of receipts for $7,035.00 for the respondent's attendance at hockey camps in 2008 and 2010. The trial judge accepted the evidence of the defendants by counterclaim that they did not intend to deceive Consultants and dismissed the counterclaim. No appeal is taken from this finding.

[48] Following the release of the reasons for judgment, and prior to entry of a final order, the respondent applied for reconsideration or re-opening of the judgment on two bases; first, to clarify two asserted ambiguities in the remedies portion of the trial reasons and second, to advance new submissions as to her order respecting the repurchase of the respondent's shares.

[49] The trial judge accepted that there were ambiguities in her reasons in the way she described the respondent's remedies and that she did not clearly delineate

which party was subject to which remedy. On December 12, 2012, she issued her supplemental reasons for judgment.

[50] In her supplemental reasons the trial judge corrected the arithmetic error in her first reasons relating to the difference between the share prices in January of 2011 and May of 2012, and clarified that the respondent was required to sell his shares to Holdings and Holdings was required to purchase his shares.

[51] The trial judge also corrected her earlier reasons by stating that the respondent's shares were to be purchased by Holdings at a price of $228.05 per share, and that Consultants were liable to the respondent in damages for the lost bonuses and benefits and loss of increase in share value that he suffered during the period when he ought to have been given reasonable notice of dismissal.

[52] The trial judge further clarified that repayment of the respondent's shareholder loan was not damages for wrongful dismissal. It was simply repayment of a debt owed by Holdings to the respondent pursuant to s. 227 of the *BCA*.

[53] Finally, the respondent sought to file additional submissions arguing that there are different tax consequences to him, depending on the way the purchase of his shares is fashioned, and seeking to have the court make the most favourable orders from a tax standpoint. The trial judge rejected the application on the basis that such submissions could have been made during the trial and that they were not supported by the evidence at trial or the theory of his case as argued at trial. She concluded that the new issue was not a proper matter for her reconsideration.

Issues on the Appeal and the Cross Appeal

[54] The appeal in this matter is restricted to the respondent's damage awards for his shareholder's benefits during the reasonable notice period of 18 months. The appellants contend that the trial judge erred:

a) in awarding the respondent the difference in share value between the date of his dismissal ($228.05) and the end of the notice period ($431.13); and

b) in awarding the respondent the portions of the bonus pool based on shareholding (the lost share pool and equal pool bonuses of $157,697.00).

[55] On his cross appeal, the respondent contends that the trial judge erred in refusing to value his shares at fair market value ($533.86), rather than at the price intended by Holdings for 2012 ($431.13).

Discussion

a) The Appeal

i) The Bonus Pools and the Valuation of the Respondent's Shares

[56] The appellants complain that the respondent did not include any plea relying on an implied term in his employment contract. When this issue was raised before the trial judge following her initial reasons for judgment, the following exchange took place with Mr. Brearley, trial counsel for the appellants:

> THE COURT: Well there was no written contract, so isn't every term implied? I'm sorry, I am completely missing the point. If there's no written employment contract, isn't every term of it implied? That's the point.
>
> MR. BREARLEY: Well certainly there wasn't an employment contract, that's true. But there was an implied term that the benefits of shareholdings [indiscernible] the employment contract.
>
> THE COURT: Well they never - - they never talked about the terms of the contract so it has to be implied; right? And that's what the whole trial was about was whether it should be or shouldn't be. I mean no one ever argued that it was expressly promised. It was always argued that it's implicit in their relationship that he would be entitled to all the benefits. I don't --
>
> MR. BREARLEY: With respect, My Lady, it wasn't actually. The benefits of shareholdings were argued to rise and fall with the shareholders agreement, not with the employment contract.
>
> THE COURT: Well then why did the plaintiff rely on all those cases that say it's part of the employment contract? I mean that's - - that's what the

> argument was. Those cases all say that that's an implied term of contract. It's not expressed because there's no written contract.
>
> Anyhow, I'm not going to get into whatever arguments you both want to advance on appeal. I'm not going to re-open. You can say as a record that he offered, and he can make whatever he wants to do of that. But I'm not going to parse the terms of the reasons for judgment to improve anyone's position on appeal. That's not …
>
> MR. BREARLEY: That's my position.

[57] The appellants also contend that the respondent did not advance any claim in his pleadings for the value of his shares as damages for breach of his employment contract or with respect to any bonus entitlement.

[58] The appellants refer to the decision of this Court in *Insurance Corp. of British Columbia v. Patko*, 2008 BCCA 65, for the proposition that it is improper for a judge to decide a case on issues that were not argued. It is my opinion that the reasoning in *Patko* does not assist the appellants. In his opening statement, counsel for the respondent identified two of the issues to be determined at trial as:

> One, wrongful dismissal. Was the Plaintiff dismissed for cause? Two, if so, what is the measure of damages, and in particular, do those damages include the increase in the formulated sale price [Of the shares in Holdings] during the notice period, and does it include the bonuses that he would have received during the notice period?

[59] Although he chose not to make an opening statement, counsel for the appellants recognized in his closing submissions that:

> Mr. Hawkes claim has two components. He sues *qua* employee and he sues *qua* shareholder.

[60] Later in his closing submissions, counsel for the appellants argued:

> A significant portion of Mr. Hawkes' bonus was based on his status as a shareholder. That status, we say, came to an end at the time of his dismissal on November 22nd. Any award for lost bonus has to back out an amount attributable to his status as shareholder.
>
> …
>
> We say that there is no basis to conclude that the loss of profit through his shares in Holdings should be considered damages owed by Consultants for termination without cause.

[61] The issues that the appellants contend were not pleaded were all clearly seen by them as live issues at trial, and were stated by the trial judge to have been the subject of argument. The appellants thus suffered no prejudice from a lack of more specific pleadings.

[62] While I have found that it was open to the trial judge to consider these issues, in my opinion, she erred in finding that the contract between the parties included an implied term that the respondent would be entitled to share in the benefits accruing to shareholders, including bonuses and any increases in share value, during a period of reasonable notice of termination of employment. I am not persuaded that her error affected the correct disposition of the case.

[63] In *Longman v. Federal Business Development Bank* (1982), 36 B.C.L.R. 115 (S.C.), Wallace J., as he then was, cited with approval the reasoning of the House of Lords in *Trollope & Colls Ltd. v. North West Metro Regional Hospital Board*, [1973] 1 W.L.R. 601 at 609 as follows:

> Faced with the conflict of judicial opinion in this case, I prefer the views of Donaldson J. and Cairns L.J. as being more orthodox and in conformity with the basic principle that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.
>
> [Emphasis added.]

[64] Given the position that the parties took before the trial judge, it is difficult to conclude with any certainty that they anticipated the problem. Had they done so, presumably the positions that they took before the trial judge would have been the positions they took amongst themselves.

[65] The appellants contend that according to the terms of the BSA, the respondent's shares had to be sold to other shareholders or back to Holdings within 60 days of his termination and he had no right to participate in any of the benefits of a shareholder after that date. It is my opinion that the appellants are correct in this contention. However, this does not affect the respondent's entitlement to the benefits he would have received had he continued as an employee during the 18 month notice period.

[66] The trial judge correctly pointed out at para. 6 of her supplemental reasons:

> The plaintiff also claimed general damages for his wrongful dismissal. As he stated in his written opening submission at para. 35 (a theme repeated elsewhere, including at paras. 34(b) and 46):
>
> > First and foremost, this is a wrongful dismissal claim, and the plaintiff says that he was dismissed without cause and without reasonable notice, and is entitled to be put into the position that he would have been in, if his employer, Levelton Consultants Ltd., had given him reasonable notice of termination, including:
> >
> > a. Lost wages until he found alternate employment (December 5, 2011);
> >
> > b. The cost to replace lost benefits until he found alternate employment;
> >
> > c. The bonuses that he would have earned during the period of reasonable notice;
> >
> > d. The difference between the formulated price [for his shares] at the time of his dismissal and the higher formulated price [at the end of the reasonable notice period].

[67] The trial judge referred to the decision of Madam Justice Huddart in *Saalfeld v. Absolute Software Corp.*, 2009 BCCA 18. In that case, Huddart J.A. observed at para. 20:

> It is not disputed that the measure of damages for breach of an employment contract is what the employee would have received if the contract had been performed according to its terms: *Nygard International Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103 (C.A.); and *Iacobucci v. WIC Radio Ltd.*, 1999 BCCA 753, 72 B.C.L.R. (3d) 234…

[68] In *Saalfeld*, as here, a share option plan was integral to the employment contract, and thus entitled the terminated employee to damages for the loss of its value.

[69] This was the approach preferred by Madam Justice Southin in this Court in *Nygard International Ltd. v. Robinson*, [1990] 46 B.C.L.R. (2d) 103 at 106-107, where she wrote:

> … When a contract is repudiated and the innocent party accepts the repudiation, which in my opinion is what happened here, the contract remains alive for the purpose of assessing the compensation to be paid. That compensation, that is to say, damages for the breach are what the innocent party would have received or earned depending on the nature of the contract had it been performed according to its terms. Here had it been performed according to its terms it would have been terminated within 30 days and thus, in my opinion, the defendant, the respondent in this Court, was entitled to whatever amount he would have earned in that 30 days according to the evidence…

[70] This approach was also applied in *Iacobucci v. WIC Radio Ltd.*, 1999 BCCA 753 at para. 24, where Chief Justice McEachern wrote:

> Applying the foregoing to the facts of this case, it is my view that the plaintiff was entitled to recover damages equivalent to the benefits he would have received if he had remained as an employee until the expiration of a period of reasonable notice. It makes no difference, in my view, that he cannot require WIC Western to accept his attempted exercise of future options. The value of such a right is a part of the measure of the damages he is entitled to recover from WIC Radio. In this respect, I note that the decision of the Committee was that it would not be necessary for the optionees to raise funds to exercise their options and arrangements were made with a broker to pay the optionees out. In other words, the plaintiff's entitlement became a cash payment during the period of reasonable notice.

[71] See also *Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683, where Madam Justice Saunders wrote at para. 20:

> On the basis of these authorities and the clear principle that Mr. Gillies is entitled to be treated, for remedial purposes, as if he were an employee throughout the notice period, the issue here is whether Mr. Gillies would have been entitled to participate in the IPO had it been issued during the period of reasonable notice…

[72] The trial judge found that the respondent's salary, entitlement to shareholdings and bonuses were the benefits of his employment. At para. 219 of her reasons she stated that:

> … damages in a wrongful dismissal case are measured by what the employee would have earned had his employment continued to the end of the reasonable notice period.

[73] In my opinion, she was correct in reaching this conclusion. Having reached that conclusion, her error in implying a term in the employment agreement that the respondent would be entitled to share in the benefits accruing to shareholders, both bonuses and any increases in share value, during a period of reasonable notice of termination of employment was of no material consequence.

[74] Implying the term was also wrong in law because it conflated a general legal principle regarding remedies for wrongful dismissal with the content of a specific contract. It was unnecessary to imply the term into the contract in order to enable the respondent to recover the benefits he would have enjoyed during the notice period. Even without such a term, having been wrongfully terminated by Consultants, he was entitled to recover the benefits and bonuses and increases to which he, as an employee would have been entitled as a part of his compensation package with the Consultants.

[75] Other than its effect upon the respondent's ability to continue to hold shares in Holdings, once his employment with Consultants was terminated, I am unable to accept that the BSA was a relevant consideration in the assessment of the respondent's damages for his wrongful dismissal.

[76] Had the respondent been given the reasonable notice of his termination determined by the trial judge, he would have received his salary, and retained his shares for 18 months, and received bonuses as a shareholder of Holdings during that period. He would also have been able to retain his shares in Holdings until the end of the 18 month period, at which time he would have been obliged to sell them in accordance with the BSA for the then effective price of $431.13 per share.

[77] In the result, it is my opinion that the trial judge was correct in valuing the respondent's shares at $431.13 per share, and in awarding him damages to include his salary, his lost bonuses and the value of his shares, calculated at $431.13 per share as his compensation for his dismissal without cause.

ii) Is there a Remedy Available to the Respondent Pursuant to s. 227 of the *BCA?*

[78] The trial judge found that Consultants' dismissal of the respondent was oppressive, entitling him to damages pursuant to s. 227 of the *BCA*. Despite that finding, she declined to award damages for that oppression, concluding at para. 377 of her reasons:

> However, based on the findings I have already made, Levelton's attempt to deny Mr. Hawkes the benefits he would have received as shareholder during a period of reasonable notice of termination of employment (his bonuses and the increase in share value) may be such as to constitute oppressive or unfairly prejudicial conduct, contrary to s. 227(2) of the *BCA*. I have already provided remedies for these wrongs in the wrongful dismissal aspect of Mr. Hawkes' claim: Mr. Hawkes' shares should be purchased at a price of $431.03 per share; and, Mr. Hawkes has been awarded damages for the lost bonuses. I see no need for additional remedies.

[79] The trial judge determined that the respondent's entitlement pursuant to s. 227 of the *BCA* was duplicative to his entitlement pursuant to a wrongful dismissal analysis. While the trial judge awarded the respondent repayment of his shareholder's loan under s. 227 of the BCA, no additional damages were awarded for the asserted oppression.

[80] As I would uphold her order based upon the appropriate remedy for the respondent's wrongful dismissal, I do not consider that it is necessary to resolve whether the trial judge's analysis of the respondent's entitlement to a remedy pursuant to s. 227 is correct.

b) The Cross Appeal

[81] The respondent contends that the trial judge erred by not awarding him the fair market value of his shares in Holdings. As I understand him, his position is

premised on the hypothesis that had his employment with Consultants not been terminated as it was, he would not have been terminated at all, and he would thus have enjoyed his shareholder's status until he reached the age of sixty-one, and then have been obliged pursuant to the BSA to divest himself of twenty per cent of his shares in each of the five years that followed his sixty-first birthday.

[82] His contention is that he would then enjoy the eight years of increase in the value of his shareholding, and that that increase would have tracked the increase in value of his shareholding that had been experienced up until the expiration of what the trial judge determined was the reasonable period of notice to which he was entitled.

[83] I see no merit in this contention. The respondent was terminated. While his termination was found to have been wrongful by the trial judge, that entitled him damages as if he had remained as an employee until the expiration of a period of reasonable notice. The disposition of his shares was not premature, but required once he ceased to be an employee of Consultants, and that ought to have occurred 18 months after he was terminated.

[84] The trial judge's award for the value of the respondent's shares was based upon the share value at the end of the period of reasonable notice, and there is, in my opinion, no basis upon which the valuation should be extended beyond that period.

[85] I would not accede to the respondent's contention and would dismiss his cross appeal.

c) Costs

[86] I would order that the respondent should recover his costs of the appeal, and that the appellants should recover their costs of the cross appeal.

"The Honourable Mr. Justice Hinkson"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Neilson"