independent verifiable evidence to be before the court in the future that would enable the oppression claims to be evaluated.

For a brief discussion of the issue of liability for the costs of a receiver, see heading 6:100.20, "Liability for Costs of a Receiver".

6:50.30 Amending Corporate Documents and Agreements

Section 241(3)(*c*) of the *CBCA* allows the court to make an order regulating a corporation's affairs by amending the articles or by-laws[92] of the company or amending a unanimous shareholder agreement. Intervention to change the terms of a unanimous shareholder agreement must be undertaken sparingly, since it runs against the fundamental principle that parties are free to enter into contracts and should be held to bargains freely made. However, in the case of oppression, courts have rewritten terms of unanimous shareholder agreements to rectify inequitable situations[93] or to impose mechanisms which the parties can later use to help themselves, such as buy-sell provisions.[94] In the face of radical conduct, the courts have shown a willingness to make significant changes to a shareholder agreement, including changing the constitution of the board and the *quorum* required to make decisions.[95] Perhaps one of the most useful and least invasive amendments is the inclusion of a term requiring unanimous consent of the shareholders before amendments are made to the shareholder agreement.[96]

6:50.40 Directing the Issuance or Exchange of Securities

Section 241(3)(*d*) of the *CBCA* authorizes the court to direct the issuance or exchange of securities of the company. However, it is a more obtrusive order than many of the other available orders that will serve to rectify the conduct complained of.[97] This remedy has seldom been applied in Canada. An order directing the issuance of securities has been found to be

92 See, for example, *Trnkoczy v. Shooting Chrony Inc.* (1991), 1 B.L.R. (2d) 202 (Ont. Ct. (Gen. Div.)), where the company's by-laws were amended, or *Tsui v. International Capital Corp.*, [1993] 4 W.W.R. 613 (Sask. C.A.), affd 113 Sask. R. 3 (C.A.), where corporate articles were amended to grant voting rights to newly appointed directors.

93 See, for example, *Daniels v. Fielder* (1988), 65 O.R. (2d) 629 (H.C.J.).

94 See, for example, *Walsh v. Erectoweld Co.* (1992), 37 A.C.W.S. (3d) 1039 (Ont. Ct. (Gen. Div.)); *Wiggins v. Savics* (1989), 19 A.C.W.S. (3d) 51 (Ont. H.C.J.), decided under the *OBCA*. However, in *Lecce v. Lecce* (1990), 72 O.R. (2d) 540 (H.C.J.), the courts were unwilling to use the *OBCA* oppression provisions to add a buy-sell provision into a shareholder agreement that was entered freely after receiving independent legal advice, when the agreement had been in effect for more than 20 years.

95 *Gillespie v. Overs*, [1987] O.J. No. 747 (S.C.J.), pursuant to the *OBCA*.

96 See, for example, *Explo Syndicate v. Explo Inc.* (1989), 16 A.C.W.S. (3d) 218 (Ont. S.C.).

97 See, for example, *Ferguson v. Imax Systems Corp.* (1981) 12 B.L.R. 209 (Ont. H.C.J.), revd 38 O.R. (2d) 59 (Div. Ct.), revd 43 O.R. (2d) 128 (C.A.), leave to appeal to S.C.C. refused 2 O.A.C. 158. The trial judge refused to exchange the complainant's preferred shares for common shares. Many other options were available that were less intrusive, including an order for purchase of the complainant's shares.

appropriate where a corporation improperly refused to issues shares under a warrant.[98] Similarly, in appropriate circumstances, the court will enforce the validity of share certificates delivered by a corporation.[99] As a slightly less obtrusive alternative to making this order, the court has opted to order the directors to meet to reconsider resolutions dealing with an offering of shares.[100]

6:50.50 The Power to Appoint or Replace Directors

Section 241(3)(*e*) of the *CBCA* gives the court the power to make an order appointing directors in place of, or in addition to, all or any of the directors in office. This power is one of the more intrusive powers granted to the court by the legislature. It may also be appropriate to remove a director who has used unequal powers to operate the company as a sole proprietorship, thereby "making a mockery of the notion of incorporation and the fundamental objects and expectations of . . . shareholders, in joining the corporate enterprise".[100a] Further, where company directors have considered only their own interests or the interests of majority shareholders, and have neglected the interests of the minority, this relief may be warranted.[100b] As with any oppression remedy, the remedy of removal of directors must not exceed the remedy necessary to rectify any oppression.[100c] Although this type of order is radical, courts have demonstrated a willingness to make this type of order where a director has demonstrated gross neglect of, or wilful refusal to perform, duties.[101] In some cases, it is sufficient that directors have ignored

98 *Working Ventures Canadian Fund Inc. v. Angoss Software Corp.*, [2000] O.J. No. 4537 (S.C.J.), affd 2001 ONCA 308 (C.A.).

99 *Bank Leu AG v. Gaming and Lottery Corp.* (2003), 231 D.L.R. (4th) 251 (C.A.), leave to appeal refused *per* S.C.C. bulletin 4/2/04, at p. 541.

100 *Re ASI Holdings Inc.* (1996), 63 A.C.W.S. (3d) 52 (Nfld. S.C.).

100a *Brokx v. Tattoo Technology Inc.* (2004), 50 B.L.R. (3d) 221 (Ont. S.C.J.), at para. 11.

100b *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2004), 1 B.L.R. (4th) 186 at para. 69 (Ont. S.C.J.), affd 266 D.L.R. (4th) 228 (C.A.), citing *Sparling v. Javelin International Ltd.*, [1986] O.J. No. 2453, affd [1992] R.J.Q. 11 (C.A.). The court in *Hollinger* also cites in support of this proposition: *Such v. RW-LB Holdings Ltd.* (1993), 11 B.L.R. (2d) 122 (Alta. Q.B.); *820099 Ontario Inc. v. Harold Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.); *Aquino v. First Choice Capital Ltd.* (1996), 143 Sask. R. 81 (Q.B.), appeal allowed in part 148 Sask. R. 288 (C.A.). For an example of a case where directors were removed for conduct derived to obtain personal benefit, see *Seymour Resources Ltd. v. Hofer*, [2004] A.J. No. 1087 (Q.B.), where Martin J. held, at para. 25: "On all of the information, the kindest view I can take is that Mr. Hofer, through gross mismanagement and unwarranted extravagance, which greatly benefited him and Ms. Westergard, brought this company to its financial knees. I find that this mismanagement over the four-month period was oppressive and unfairly prejudicial to minority shareholders".

100c *Hollinger*, *supra*, footnote 100b, at para. 95.

101 *Tsui v. International Capital Corp.* (1993), 108 Sask. R. 62 (Q.B.), affd 113 Sask. R. 3 (C.A.), pursuant to the Saskatchewan *Business Corporations Act*, R.S.S. 1978, c. B-10 ("*SBCA*"); *Such v. RW-LB Holdings Ltd.*, *supra*, footnote 100b; *Pelley v. Pelley* (2001), 200 Nfld. & P.E.I.R. 303 (Nfld. S.C.), appeal allowed in part 221 Nfld. & P.E.I.R. 1, leave to appeal to S.C.C. granted 222 Nfld. & P.E.I.R. 305, leave to appeal to S.C.C. refused 329 N.R. 199*n*.

2012 ONCA 620
Ontario Court of Appeal

Schembri v. Way

2012 CarswellOnt 11632, 2012 ONCA 620, 112 O.R. (2d) 241, 222 A.C.W.S. (3d) 64, 7 B.L.R. (5th) 1

Gordon Schembri, Schembri Financial Limited, Leaf Construction Management Inc. and 1784652 Ontario Inc., Plaintiffs/Appellants and Al Way, Jamesway Construction Corporation, Kingsley Financial Inc., Triumph Financial Holdings Inc., 1725030 Ontario Inc., Premier Project Consultants Ltd., National Rent-All Inc., Terra-Tec Excavating, Oxford & First St. Inc., Simcoe & Eastwood Avenue Inc. and 359 King Ontario Inc., Defendants/Respondents

K. Feldman, Alexandra Hoy JJ.A., Spence J. (ad hoc)

Heard: February 13, 2012
Judgment: September 20, 2012
Docket: CA C54258

Proceedings: reversing *Schembri v. Way* (2011), 2011 ONSC 8021, 2011 CarswellOnt 5842 (Ont. S.C.J.); additional reasons at *Schembri v. Way* (2011), 2011 ONSC 4098, 2011 CarswellOnt 9086 (Ont. S.C.J.)

Counsel: James M. Wortzman, for Appellants
P.A. Neena Gupta, for Respondents
Gary L. Petker, for Faye Patterson
Ian M. Hull, for Yrustees of the Way Family Trust

Subject: Civil Practice and Procedure; Corporate and Commercial

APPEAL by plaintiffs from judgment reported at *Schembri v. Way* (2011), 2011 ONSC 8021, 2011 CarswellOnt 5842 (Ont. S.C.J.), refusing to add two proposed defendants or to amend statement of claim with new ground of relief under oppression remedy.

K. Feldman J.A.:

1 This appeal arises from a pleadings motion. The motion judge allowed a number of amendments to the statement of claim but refused to add two parties — the Way Family Trust and Faye Patterson - or to add a new remedy for the oppression claim. The plaintiffs appeal those refusals.

Facts

2 1784652 Ontario Inc. ("Schembrico") and 1725030 Ontario Inc. ("Wayco") entered into a joint venture agreement for the demolition and redevelopment of a property at 345 King St. N. in Waterloo, Ontario in April 2007. They were to share the profits equally.

3 The plaintiffs allege that the defendants improperly boosted the costs of the project by retaining a number of related companies to do work at inflated prices, thereby reducing the amount of the shared profit. It is also alleged that the defendants diverted Schembrico's portion of the profits into other related entities. All of these actions, say the plaintiffs, fraudulently deprived Schembrico of its profits under the joint venture agreement.

4 The anticipated profit from the sale of the redeveloped property was $10 million from which Schembrico anticipated receiving $5 million. When it received only approximately $1.4 million, Schembrico demanded an accounting but did not receive it.

5 Al Way, Kingsley Financial Inc. (of which Mr. Way is an officer and director), Triumph Financial Holdings Inc. ("Triumph"), Gordon Schembri and Schembri Financial Ltd. (of which Mr. Schembri is an officer and director) entered into a shareholder agreement in April 2008 regarding the manner in which the affairs of Triumph were to be conducted.

6 Schembri Financial holds 45 per cent of the shares of Triumph, while Kinglsey Financial owns 55 per cent. Triumph, in turn, owns 100 per cent of the shares of companies (the "Triumph Subsidiaries") that own lands, in London, Oshawa and Waterloo (the "shareholder lands").

7 The plaintiffs allege that Wayco improperly used Schembrico's profits from the joint venture to finance the redevelopment of the shareholder lands.

8 After commencing the action, the plaintiffs brought a motion before Roberts J. for the appointment of a receiver and manager of the Triumph Subsidiaries that were developing the shareholder lands and for the delivery of documentation regarding the joint venture. Affidavits and cross-examinations on the affidavits produced a significant amount of evidence for use on that motion.

9 From both the cross-examinations, as well as from other disclosures in the context of the motion, the plaintiffs learned that $6 million of the profits from the joint venture had been paid to a Way corporation, Premier Project Consultants Ltd. ("PPC").

10 It was also revealed that $855,000 of the $6 million had been directed to other Way corporations: 158170 Ontario Ltd., 1604909 Ontario Inc., The Shores Ltd., Jameshill Developments Ltd., The Spruce Street Lofts Inc., and Maple Hill Creek Apartments Inc. (the "Wayco beneficiaries").

11 Roberts J. appointed a receiver and manager of the Triumph Subsidiaries and ordered the production of all financial documents relating to the joint venture. She did so after reviewing an extensive evidentiary record and on the basis of the defendants' acknowledgement that the plaintiffs had presented a strong *prima facie* case against Mr. Way and the Way companies "of serious financial and accounting irregularities and improprieties." She noted that the defendants had not disputed the evidence presented by the plaintiffs: [*Schembri v. Way*] (2010), 76 B.L.R. (4th) 147 (Ont. S.C.J.), at para. 6.

12 Based on this undisputed evidence, Roberts J. made a number of significant findings of wrongdoing by Mr. Way and the companies he controlled. For instance, she found that Mr. Way had shuffled money around to his corporations, that he had not complied fully with court-ordered production and he was willing to manipulate figures and to ignore his accountant's advice.

13 Following the motion, the plaintiffs sought to add a number of parties that they allege improperly received monies from the joint venture, including the Wayco beneficiaries, a trust controlled by Mr. Way (the "Way Family Trust" or "Trust"), as well as Ms. Patterson who, as a director, officer and employee of a number of Way companies, is alleged to have participated with Mr. Way in shuffling the joint venture money. The plaintiffs also sought to add a claim for a redistribution of the shares of Triumph as part of the oppression remedy.

14 The motion judge granted the request to add the Wayco beneficiaries, but refused to add the Way Family Trust, Ms. Patterson, or the new ground of relief under the oppression remedy as set in para. 2(k) of the proposed amended statement of claim.

Issues

15 Did the motion judge err in law by refusing to add the Way Family Trust or Ms. Patterson as parties, or by refusing to allow the statement of claim to be amended by adding a claim for the readjustment of the shares of Triumph as an oppression remedy?

Analysis

(1) The proposed claim against Faye Patterson

16 In the proposed amendments that add the claims against Ms. Patterson, there are no new paragraphs where specific new allegations are made against her. Instead, her name is added to existing paragraphs where she is alleged to have participated in certain of the activities of Mr. Way and some of his companies either as an employee or as a director and officer. She is the president and a director of PPC and the vice president of Jamesway.

17 The specific causes of action identified by the motion judge that were proposed to be added against her are conspiracy, inducing breach of contract and breach of fiduciary duty based on the following broad allegations: 1) having joint control with Mr. Way of funds that belonged to the joint venture and participating in the diversion of those funds to other Way entities and in the fraudulent inflation of the costs of the joint venture; 2) together with Mr. Way, improperly using Schembrico's share of the profits from the joint venture on other projects involving the shareholder lands; and 3) conspiracy to injure the plaintiffs by depriving them of money that they are due and owing by, for example, diverting Schembrico's profits to PPC for baseless expenses.

18 The motion judge found that the proposed amendments did not disclose a reasonable cause of action against Ms. Patterson in her personal capacity. He viewed the allegations as mere claims against the corporations of which Ms. Patterson was a directing mind, as in *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.) where Finlayson J.A. stated, at p. 491:

> Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the directors of Peoples personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation. In this case, there are no such allegations.

19 The motion judge also found that the claims against Ms. Patterson were bald allegations with no factual basis and that the proposed pleading did not specify why she was being sued as an individual separately from the corporations. He concluded by saying that, if evidence is disclosed in the examinations for discovery and production of documents that would found the claims he had denied, then the plaintiffs could renew their motion to add Ms. Patterson.

20 The motion judge then assessed the viability of each of the three causes of action proposed against her. Dealing first with the claim against Ms. Patterson for conspiracy to injure, the motion judge found that all of the components of that cause of action were properly pleaded against her in para. 98 of the proposed amended statement of claim. In that paragraph, it is asserted that some of the defendants, including Ms. Patterson, acted in concert to deprive the plaintiffs of their profits. The motion judge concluded that "[i]f such is proven, it naturally follows that if the conduct is found to be unlawful, and such deprivation is proved, the defendants would have known that injury to the plaintiffs would be the natural result."

21 Nevertheless, although the conspiracy claim was sufficiently pleaded and particularized, the motion judge would not allow that claim to be added against Ms. Patterson because of the ruling he had already made that there was an insufficient factual basis to ground any of the claims against her in her personal capacity.

22 The second claim was for breach of fiduciary duty. The motion judge found that the proposed amended claim did not plead facts that would give rise to a fiduciary duty between Ms. Patterson, as an employee of Mr. Way or as a director and officer of PPC and Jamesway, and the plaintiffs.

23 The third claim was for inducing breach of contract, the contract being the joint venture. After setting out the elements of the tort, the motion judge concluded that the pleading was adequate to sustain the claim against Ms. Patterson for inducing breach of contract, and that "[w]hile it lacked some particulars, it was sufficient to allow her to plead to it if that had been necessary." However, because he had found that there was an insufficient factual basis to allow Ms. Patterson to be sued in her personal capacity for any cause of action, the motion to add the claim against her for inducing breach of contract was also dismissed.

24 While the motion judge and plaintiffs do not specify which sub rule they are relying on, in my view, Rule 5.03(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, is the most applicable in the circumstances, together with r. 26.01:

> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
>
> 5.03(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.

25 The motion judge directed himself in his introduction to the reasons that "[i]n accordance with the ruling of the Ontario Court of Appeal ... amendments to add parties should be presumptively approved, unless there is abuse of the court process or non-compensable prejudice".

26 There is neither an allegation of prejudice nor a limitation period issue here, and the action is at an early stage. The plaintiffs could commence a new action against the proposed defendants and then seek to join it with the existing action. The procedure of adding parties to the existing action circumvents the costly and time-consuming process involved in that procedure.

27 Because this is a motion to amend pleadings, the allegations in the pleading are taken to be true and provable. The only issue therefore, is whether the allegations as pleaded, plead all of the necessary components of an identifiable cause of action.

28 In my view, having found that the causes of action for conspiracy to injure and inducing breach of contract were sufficiently pleaded against Ms. Patterson, the motion judge erred by not allowing her to be joined as a defendant in respect of those two causes of action.

29 The motion judge referred to the following statement by Finlayson J.A. in *ScotiaMcLeod*, affirmed by this court in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.), at p. 102:

> It is well established that the directing minds of corporations cannot be held civilly liable for the actions of the corporations they control and direct *unless there is some conduct on the part of those directing minds that is either tortious in itself or exhibits a separate identity or interest from that of the corporations such as to make the acts or conduct complained of those of the directing minds.*
>
> [Emphasis added.]

30 The fact that corporate actors can be separately liable if they have engaged in tortious conduct, even in the course of their duty, was also confirmed by this court in *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (Ont. C.A.), at p. 112-113.

31 At para. 98, the motion judge made the following statement:

> In the case at bar, the factual foundation for the tort of conspiracy, the claim for breach of fiduciary duty and inducing breach of contract, as pleaded, is identical to that which underlies the allegations for breach of the [joint venture agreement] and the Shareholders Agreements. The damages alleged in all cases are the same. The allegations made against Ms. Patterson are bald allegations with no factual basis to found a claim against her in law.

32 With respect to the motion judge, in this passage he has not acknowledged that in this case there is a clear pleading of fraudulent conduct by Ms. Patterson, which is detailed to the same extent as the claims against other defendants. This brings the case squarely within the type of conduct where a claim against the directing mind is not barred.

33 The motion judge also erred in suggesting that there must be evidence to sustain such a claim. It may be that because there was such an abundance of evidence already developed in the record in this matter, the motion judge expected sworn or documentary evidence to support the proposed new pleadings. However, that is not a requirement on a motion to add a party (subject to other considerations such as prejudice or abuse of process). As Moldaver J.A. stated in *Andersen Consulting v. Canada (Attorney General)* (2001), 150 O.A.C. 177 (Ont. C.A.) at para. 34: "[T]he law is clear that unless the facts alleged are based on assumptive or speculative conclusions that are incapable of proof, they must be accepted as proven and the court should not look beyond the pleadings to determine whether the action can proceed."

34 I would therefore allow the appeal with respect to the addition of Ms. Patterson as a defendant on the two issues of conspiracy to injure and inducing breach of contract. The plaintiffs are not pursuing the claim for breach of fiduciary duty.

(2) The proposed claim against the Way Family Trust

35 The plaintiffs sought to add the Way Family Trust as a defendant that they allege knowingly received from Mr. Way and Way entities money that ought to have gone to the plaintiffs. The proposed amendments add the Trust into various existing paragraphs of the statement of claim as one of a list of parties that either received the plaintiffs' funds or participated in the plan to divert those funds. However, there are no particulars of any of these allegations.

36 The motion judge rejected a number of alleged defects with the pleading and would have been ready to approve the addition of the Way Family Trust had there been any evidence to support the allegations against it.

37 He rejected the submission that the pleading lacked particularity. He found that it was sufficient for a claim for fraud and breach of trust to allege knowing receipt of monies that the Trust knew or should have known were impressed with a trust for the plaintiffs.

38 He accepted the plaintiffs' explanation that the reason the Trust was not named as an original party to the action was that they only discovered the payments out of some of the joint venture profit proceeds to Way companies after the litigation was commenced.

39 He also rejected the submission made by counsel for the trustees that the plaintiffs only sought to add the Way Family Trust for strategic reasons, including to obtain discovery from it and to apply pressure on the other defendants to settle. He reasoned that Mr. Way is one of the trustees and would be examined in his personal capacity in any event.

40 Notwithstanding that he rejected those arguments, the motion judge refused the amendment because, unlike the Wayco beneficiaries that were added, there was no evidence in the record already developed and no evidence referred to by Roberts J. that the Way Family Trust had received any of the diverted funds. Also of significance for the motion judge was the fact that the plaintiffs had commissioned a report from KPMG but had not produced that report and had not suggested, based on that report, that the accountants had found that the Way Family Trust had received any of the disputed funds.

41 The motion judge relied on the decision of C. Campbell J. in *Hilltop Group Ltd. v. Katana*, [2001] O.J. No. 1564 (Ont. S.C.J.), for the proposition that it is appropriate when considering a motion to add parties for the court to consider evidence advanced in support of the claim in order to assess its tenability. However, the facts in that case make it inapplicable to this situation. In *Hilltop*, the plaintiffs by counterclaim sought to name a new defendant by counterclaim two weeks before the trial. The basis of the claim was that they had only recently learned that the proposed new defendant was a 50 per cent shareholder in one of the companies operated by her husband, who was also a defendant, and that she may have played a role in his impugned activities.

42 The rule being relied on was rule 5.04(2), which allows a party to be added or deleted at any stage subject to non-compensable prejudice. The focus of the judge's analysis in that case was the lateness of the request, the effect on the upcoming trial and the issue of prejudice, and in that context, the tenability of the proposed new claim. For that purpose, because the proposed pleading was so bald, the court looked at the transcripts that were available to see if there was any suggestion of the involvement of the proposed new party and there was not. The court therefore found, among other things, that the pleading did not disclose a tenable claim. However, that was true without looking for evidence. Nonetheless, the judge was willing to apply any evidence he could find to support the claim and fill in the pleading if there was any basis for doing so, but there was none.

43 In my view, Moldaver J.A.'s statement in *Andersen*, quoted above, is again applicable. Where a party wishes to amend a claim or add a new party within the limitation period, the facts pleaded are taken to be true and provable (subject to unprovable assumptive or speculative conclusions) and the court is to assess the tenability of the claim on that basis.

44 The trial judge also found that to join the Way Family Trust would unduly complicate the action and cause significant prejudice to the Trust in having to produce documents and incur accounting and legal expenses. However, this is not the type of prejudice envisioned by the rule. Unfortunately, everyone involved in litigation must endure the time and expense involved in its procedures. In any event, the plaintiffs were not seeking to add a party late in the litigation but at a fairly early stage before examinations and production.

45 Once the motion judge determined that the proposed pleadings adequately disclosed and pled the asserted causes of action, the fact that the plaintiffs did not produce evidence to support the allegations was not a reason to refuse the amendment.

(3) The claim for reapportionment of the share percentage holdings in Triumph

46 The plaintiffs sought to amend para. 2(k) of the statement of claim from claiming a 50/50 interest in Triumph to reversing the shareholdings so that Schembrico would hold 55 per cent and Wayco 45 per cent. The motion judge held that there was no factual basis for this claim as pleaded. At the request of the defendants, the entire paragraph was struck from the pleading with leave to amend.

47 The plaintiffs rely on s. 248(3) of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B 16 ("OBCA"), which sets out the available remedies for oppression. Section 248(3)(d) includes as a potential remedy "an order directing an issue or exchange of securities". The defendants submit that the case law only allows this type of remedy to be ordered where the circumstances call for it and that there is no suggestion that a readjustment of the share split in the joint venture corporation was ever contemplated as a remedy for any breach.

48 They say that, at a minimum, the plaintiffs would have to plead that Schembri Financial had a reasonable expectation that it might secure a majority position in the event of a dispute with Kingsley Financial, that a re-apportionment of shares would address the oppression and that there is no less intrusive way to achieve redress.

49 In my view, the pleaded amendment should be allowed under Rule 26. The facts pleaded that are alleged to constitute the oppression, if proved, will give the court the authority to order the appropriate oppression remedy provided under the OBCA. It will be for the trial judge to determine what is appropriate based on the evidence and the submissions at

the time. There is no merit in attempting to fetter the discretion of the trial judge at the pleading stage, subject to any particular circumstances not present in this case.

Additional Issue: Costs

50 In their supplementary notice of appeal, the plaintiffs objected to part of the costs order made by the trial judge "in the cause". There was no reference to this ground of appeal in their factum. Some mention was made of the issue in oral argument. I would not grant leave to appeal on this issue, which is a matter of discretion for the motion judge.

Result

51 I would allow the appeal, set aside the order of the motion judge and allow the motions to amend the pleading as follows: 1) by adding Ms. Patterson in respect of the claims for conspiracy and inducing breach of contract; 2) by adding the Way Family Trust as pleaded; and 3) by allowing the proposed amendment to para. 2(k) of the statement of claim.

52 Following the hearing, the counsel advised that they had come to an agreement regarding the costs of the appeal and below. As the plaintiffs have been successful, they will have the costs of the appeal fixed at $21,395.42 for fees, $4,728.83 for disbursements, plus HST, for which the defendants will be jointly and severally liable. They shall have the costs of the motion from the Way Family Trust in the amount of $12,000 for fees, $382.32 for disbursements, plus HST, and from Ms. Patterson in the amount of $14,000 for fees, $382.32 for disbursements, plus HST.

Alexandra Hoy J.A.:

I agree

***Spence J.* (ad hoc):**

I agree

Appeal allowed.

End of Document

CITATION: O'Neill v. Sirois

COUR SUPERIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTREAL
NO : 500-05-006871-956

DATE : 1997-02-25

EN PRÉSENCE DE :

DANIEL H. TINGLEY , J.C.S.

Martin A. O'Neill
Plaintiff

Charles Sirois, Telesystem Enterprises (T.E.L.) Ltd. and Microcell Telecommunications Inc.
Defendants

J. Tingley:-

Introduction

1 Irish born marketing guru, Martin O'Neill, began work on February 7, 1994 as the President and Chief Executive Officer of Microcell initially to prepare a long range plan to market CT2+[1] Technology under a licence from the Government of Canada and later to obtain a licence and market PCS[2] Technology. Sixteen months later, on May 12, 1995, he was summarily dismissed from these positions. He has yet to find new employment.

2 Mr. O'Neill instituted an action for wrongful dismissal claiming damages that could exceed several millions of dollars solidarily against T.E.L., his employer, Microcell, the company he was hired to run and Charles Sirois, the person who dismissed him in his capacity as Chairman of the Board of Microcell. He also seeks parallel relief from alleged oppression pursuant to Section 241 of the Canada Business Corporation's Act (Act)[3] to enforce his Microcell share purchase, pre-emption and option rights stipulated in his employment agreement with T.E.L. The action and application were joined for trial.

3 T.E.L. and Microcell allege that Mr. O'Neill was fired for cause and accordingly is not entitled to any damages or shares beyond what he has already received. Charles Sirois asserts that his actions were taken in his capacity as an officer of T.E.L. and Microcell and he cannot therefore be held personally responsible for acts done in the performance of his functions for these companies.[4]

The Facts and Proceedings

4 Microcell was incorporated in October 1992 by a group already involved in the communications business to bring to the market place a variety of personal communications services using a cordless telephone. These shareholders entered into a shareholders' agreement on December 9, 1993 which provides, amongst other things:-

Section 1

Interpretation

1.1 Definitions. In this Agreement:

"Business of the Corporation" means the business of providing public digital cordless telephone service and extends also to the business of providing personal communication services generally across Canada which for the purpose hereof is not meant to include the use of technologies for one way communication only;

...

"Shares" means shares in the capital of the Corporation, including the Common Shares, the Class A Non-Voting Shares and the Preferred Shares;

"Shareholder" means each of ... and each other person who subsequently becomes a shareholder of the Corporation and who agrees to be bound by this Agreement, and "Shareholders" means all of them collectively;

...

1.3 Privity. This Agreement shall be binding upon all Persons executing this document and all Persons who subsequently become Shareholders. Each person who subsequently becomes a Shareholder shall execute in duplicate an undertaking to be bound by this Agreement in the form of Schedule E hereto and shall deliver them to the secretary of the Corporation, who shall countersign both copies on behalf of all of the other Shareholders and return one copy to the new Shareholder. The Secretary shall distribute photocopies of such undertaking to each of the other Shareholders.

...

1.7 Binding Agreement. The present Agreement shall be and remain binding upon the parties hereto and their representatives, successors and assigns and shall continue to bind the surviving parties hereto as between themselves. This Agreement is non-assignable except as provided otherwise herein.

1.8 Special Relief. Each Shareholder agrees that the Corporation or any or all of the other Shareholders may obtain an injunction or other appropriate relief against such Shareholder if that Shareholder contravenes or falls to comply with any provision of this Agreement in any way, and further agrees that the provisions of this Section may be pleaded against such Shareholder by way of estoppel or defence....

Section 4

Share Subscription, Issue of Shares and Right of Pre-emption

4.1 Issue of Shares. No Common Shares or rights to subscribe to Common Shares may be issued by the Corporation except as provided in this Agreement.

4.2 Right or Pre-emption. The parties agree that, notwithstanding any provision of the Articles and By-laws of the Corporation, the following provisions apply in the case of the issuance of Common Shares or rights to subscribe to Common Shares (the "Additional Securities").

If the Corporation proposes to issue Additional Securities, these Additional Securities must first be offered to the Shareholders for subscription. Each Shareholder shall have the right to participate in the issuance of Additional Securities in a manner proportional to the holding by that Shareholder of Common Shares of the Corporation on a fully diluted basis before the proposed issuance, in relation to the holdings of such Common Shares by all of the Shareholders, so as to give to each Shareholder the opportunity to maintain its percentage of Common Shares on a fully diluted basis. The

Additional Securities, the issuance of which is proposed, shall be offered at a price and according to the terms and conditions determined by the Board which shall give notice ("notice of issuance") to each of the Shareholders (the "beneficiaries") specifying: (i) the number and the description of the Additional Securities to be issued and (ii) the price and the terms and conditions according to which the Additional Securities shall be issued.

Each of the beneficiaries having received the notice of issuance shall have a delay of 15 days to advise the Corporation in writing of its decision to exercise or not its rights of pre-emption in respect of the proposed issuance. It shall not be obligatory for a beneficiary to subscribe for all of the Additional Securities to which it has a right in accordance with the provisions of this Section 4.

Any Additional Security offered to a beneficiary and not subscribed for in accordance with the preceding provisions shall be offered by the Corporation to other beneficiaries (who have subscribed in full their quota of Additional Securities in the first round) who shall then have a delay of 15 days from the receipt of a new notice from the Corporation informing them of this right, to subscribe for the Additional Securities not retained, proportionally to the holdings of Common Shares of these other beneficiaries among themselves on a fully diluted basis prior to the proposed issuance.

In the event of the expiry of a delay provided for in this Section 4 without a beneficiary having indicated its intention, the said beneficiary shall be presumed to have refused to exercise its right of pre-emption in respect of the Additional Securities at issue.

...

Section 12

Arbitration

12.1 Dispute. Any dispute between the Parties concerning any matter arising under this Agreement shall be submitted to and finally resolved by arbitration under the Arbitration Act, 1991 (Ontario) (the "Act"), as amended or substituted from time to time. The arbitration shall take place at the head office of the Corporation or at such other place as all the parties shall agree upon in writing.

...

5 Martin O'Neill came to Microcell - at the time called "Canada Popfone Corporation" - with an impressive track record in marketing a wide range of consumer products, including cordless shavers and curling irons, green cones and shoes while employed with the Phillips, Gillette (Braun), Rubbermaid and Bata organizations. While still with Bata, as its President and Chief Executive Officer for North America and the United Kingdom, he was introduced to the Microcell start-up by Rourke Bourbonnais (Bourbonnais), an executive search firm. This led to negotiations with the then President and Chief Executive Officer of Microcell that culminated on February 6, 1994 in the following employment agreement (Employment Contract):-

January 28, 1994

Mr. Martin A. O'Neill 3295 Cindy Crescent Mississauga, Ontario L4Y 3J7

Dear Martin:

I wish to confirm to you the terms of your employment.

The date of commencement of your employment will be February 7, 1994 or such other date as we may mutually determine but no later than February 14, 1994. Your employer will be National Telesystem or one of its wholly-owned subsidiaries ("NTL"). NTL will make your services available to Canada Popfone Corporation ("Popfone") pursuant to a services agreement to be entered into with Popfone for that purpose. You will be

appointed President and Chief Executive Officer of Popfone effective on the date of commencement of your employment.

Your annual base salary will be $250,000. You will also be reimbursed for selected expenses (costs of leasing and using an automobile for business purposes, dues to business organizations of your choice and membership fees and dues to business and sports clubs used for business purposes) upon presentation of appropriate proof of payment, up to a maximum of $24,000. per year. Furthermore, you will be entitled to a contribution to your registered retirement savings plan of $21,875 (i.e. 8.75% of $250,000).

You will be reimbursed for selected reasonable expenses (upon presentation of proof of payment) incurred in connection with your move to Montreal, including:

travelling and lodging expenses for you and your family for travel to Montreal in January 1994;

your accommodation and living expenses from February 7, 1994 until your relocation to Montreal, which is expected to be in the summer of 1994;

your expenses incurred in connection with your relocation to Montreal (these include usual brokerage costs for selling your house, moving expenses for your household furniture and belongings, and the direct expenses of purchasing a new home in Montreal, namely notarial fees and transfer taxes); and

costs of French tutoring for you and members of your family for 12 months.

You will also receive a relocation allowance for the difference between $60,000 and reasonable moving expenses actually incurred, plus $15,000 free of income tax.

You will be entitled to a yearly bonus based on performance. The bonus will be in a range of 32% to 48% of your base salary, with a target of 40% for meeting objectives and a maximum of 48% for exceeding objectives. The annual bonus will be subject to approval by the Board of Directors of Popfone on recommendation of its Chairman. The relevant criteria will be mutually agreed upon every year as a function of corporate strategy and objectives, will be objectively measurable and will likely consist in budgetary criteria, except for 1994 when the appreciation criteria will also include subjective criteria as well as non-budgetary objective criteria such as product launch milestones. For 1996, which is deemed to be a very important year, the maximum will be 60%.

You will also be entitled to a one-time bonus payable in 1999 based on meeting three key performance criteria over the 1995 - 1998 period. More specifically, it is expected that Popfone will develop a long range plan in the course of 1994 and that such plan will be completed and approved by the Board of Directors of Popfone in the first quarter of 1995. You understand that this long range plan may differ substantially from the plan currently in force which, as you know, is based exclusively on a CT2+ development and does not include any assumptions regarding the award of spectrum in the e 1.8 - 2.0 GHz band. The extraordinary bonus will be payable based on meeting certain target levels in the long range plan for:

cumulative net operation revenues for the 4-year period;

cumulative operating cash flow for the 4-year period; and

return on average capital employed (RACE) (measured by reference to cumulative net operating cash flow and average capital employed) for the 4-year period.

The amount of this one-time bonus will be a function of the extent to which target levels are attained and exceeded, based on a scoring system which operates as follows. The bonus is $600,000, which is payable if 100 points are scored in total. The criteria (revenues, cash flow and RACE) can each generate 30 to 40 points. If a target level is attained as to 100%, 33.33 points are earned; 40 points are earned if a target level is

exceeded by 20% or more; 30 points are earned if a target level is reached as to 90%. No points are earned below 90%. The bonus is based on the aggregate score. For example, if 40 points are scored on revenues, 33.33 points are scored on cash flow and 30 points are scored on RACE, the total score is 103.33 and the corresponding bonus is $619,980, or 103.33% of $600,000.

The total bonus (annual and one-time) potential for 1994-1998, based on the above, is $1,350,000 (i.e. 4 years at $120,000, 1 year at $150,000 and a one-time bonus of $720,000. Of this amount, $250,000 will be guaranteed. However, the Board of Directors will retain discretion as to when guaranteed amounts can be paid over the 1994-1998 period, it being understood that the $250,000 guaranteed amount could be payable as late as the end of 1998 and that the right of the guaranteed amount does not vest over time.

I expect that once it begins hiring other executives, Popfone will have in place a suitable group benefits plan, including life insurance. Popfone will seek to maximize your coverage under the plan; in the event that group life insurance coverage is less than $1,000,000, Popfone will supplement your coverage, for up to $1,000,000 in coverage, by way of an individual term insurance policy on your life, on the assumption that you represent a "normal risk" for a person your age.

You will be entitled to a total of five weeks paid vacation over the course of a fiscal year, at times which naturally are not disruptive to the business.

In the event of dismissal other than "for cause", you will be entitled to claim $250,000, except for the first 5 months of your employment, during which time you will not be entitled to a severance package. It is intended that your performance would be reviewed with you during the fifth month.

You will be granted options to purchase shares of Popfone pursuant to an option agreement (the "O'Neill Option Agreement") which you will enter into with Telesystem Enterprises (T.E.L.) Ltd. ("TEL"), which is a wholly-owned subsidiary of NTL. As you know, TEL has an option agreement with Popfone (the "TEL Option Agreement") which it entered into on December 9, 1993. The purpose of the O'Neill Option Agreement will be to entitle you to a portion of the benefits accruing to TEL under the TEL Option Agreement. As such, the O'Neill Option Agreement will mirror and be subject to the TEL Option Agreement.

The basic terms and conditions of the O'Neill Option Agreement are outlined as follows:

1. You will be granted an option to buy a number of shares (the "Optioned Shares") to be determined based on the internal rate of return ("IRR") realized by Popfone's initial shareholders, based on the formula described below in paragraph 4.

2. The purchase price of the shares (the "Exercice Price") will be the weighted-average price per share to Popfone's initial shareholders. In other words, your purchase price per share will be equal to the going-in price per share for Popfone's initial shareholders.

3. The number of Optioned Shares will be determined by reference to a certain amount of capital which is notionally invested for you. For case of reference, this is called the Total Subscription Amount. The Total Subscription Amount is the product of the number of Optioned Shares and the Exercise Price:

Total Subscription Amount = Number of Optioned Shares x Exercise Price

By way of example, if the Total Subscription Amount is $1,500,000 and the Exercise Price i s $1.00, the number of Optioned Shares will be 1,500,000.

4. The Total Subscription Amount will be a function of the IRR realized by Popfone's initial shareholders. Under the IRR-based formula, the greater the IRR realized, the greater is the Total Subscription Amount, based on the following scale:
if the IRR is 25% or more, but less than 30%, the Total Subscription Amount will be $800,000;
if the IRR is 30% or more, but less than 35%, the Total Subscription Amount will be $1,000,000;
if the IRR is 35% or more, but less than 40%, the Total Subscription Amount will be $1,400,000;
if the IRR is 45% or more, but less than 50%, the Total Subscription Amount will be $1,600,000;
if the IRR is 50% or more, the Total Subscription Amount will be $1,800,000.
Once the Total Subscription Amount has been determined, the number of Optioned Shares is easily determined by dividing the Total Subscription Amount by the Exercise Price, as explained above in paragraph 3.
Once the Total Subscription Amount has been determined, the number of Optioned Shares is easily determined by dividing the Total Subscription Amount by the Exercise Price, as explained above in paragraph 3.
5. The gain which you accrue will be subject to the limitation that it will not exceed 30% of the value of TEL's shares issued under the TEL Option Agreement.
Allow me to provide an example. Assume that the amount invested by Popfone's initial shareholders is $50,000,000, at a weighted-average price per share of $5.00. Assume further that Popfone goes public 3 years after the date of investment at a price of $16.00 per share. In that case the number of Optioned Shares would be determined as follows:
The applicable IRR would be 47%: $(16.00 \div 5.00)^{33} - 1 = 47\%$
The Total Subscription Amount would be $1,600,000, as per paragraph 4 above.
The Exercise Price would be $5.00, being the weighted-average price per share to Popfone's initial shareholders, as per paragraph 2 above.
The number of Optioned Shares would be 320,000, being the Total Subscription Amount divided by the Exercise Price, as per paragraph 3 above.
Based on a per share value of $16.00, the gain accrued on the Optioned Shares would be $3,520,000.
Additional examples are found on the attached chart.
The O'Neill Option Agreement will be structured with a view to ensuring that you are not subject to adverse income tax consequences and that you qualify for the most beneficial income tax treatment available under the circumstances.
Finally, arrangements will be made to allow you to purchase shares of Popfone. More specifically, you will be entitled to purchase for up to $250,000 of shares of Popfone over the next two years. You will be entitled to purchase 125,000 shares at a price of $1.00 per share in 1994. Additionally, you will be entitled to purchase shares in 1995 for up to $125,000 at the then applicable subscription price. Your purchase of shares will not come into force until after the 5-month period contemplated in the second paragraph on page 4.
To allow you to finance these purchases of shares, Popfone will advance $100,000 in respect of the 1994 subscription, payable in 1998, and $100,000 in respect of the 1995 subscription, payable in 1999. These advances will bear interest at prime and will be secured by the shares purchased. The funds will be due immediately on dismissal whereupon you would also have the right to put your shares to Popfone at a price equal to the price for the capital call which last occurred before dismissal. A loan and pledge

agreement will be entered into to give effect to this arrangement. You would also be expected to become a party to the Popfone shareholders' agreement.

Martin, I am happy and thrilled to welcome you; I have a strong feeling that this going to be fun, challenging and highly rewarding. Yours sincerely, (Signed) Bruno Ducharme President and Chief Executive Officer

Attachment.

Accepted and agreed this 6th day of February 1994 (Signed) Martin O'Neill

6 As can be seen from the Employment Contract, Martin O'Neill became an employee of NTL "or one of its wholly-owned subsidiaries". T.E.L. is one such subsidiary and was designated as the employer. T.E.L. made available the services of Martin O'Neill to Microcell pursuant to the terms of a Management Services Agreement executed on February 7, 1994 whereby:-

Article 1

Management Services

1.1 The parties acknowledge that it is desirable and in the best interests of the corporation to use the administrative and managerial services of Telesystem and the Corporation hereby engages Telesystem to provide the services of Mr. Martin O'Neill ("O'Neill") to perform the function of President and Chief Executive Officer of the Corporation, namely to supervise, to administer and to manage the business and affairs of the Corporation generally and to exercise such power and authority and perform such other duties as need from time to time be prescribed by the directors of the Corporation.

1.2 In performing his functions as President and Chief Executive Officer of the Corporation, O'Neill shall report and be responsible to the Board of Directors of the Corporation.

1.3 It is agreed that during the term of his Agreement, O'Neill shall devote all of his time to the Corporation, to the exclusion of any other activities on behalf of Telesystem. O'Neill shall not at any time during the term of this Agreement, be an officer of National Telesystem or any of its subsidiaries.

Article 2

Fees and Expenses

2.1 As compensation for the services rendered by O'Neill hereunder, the Corporation agrees to pay to Telesystem a monthly management fee, within 5 days of each calendar month during the term hereof, equal to the total of (i) the sum paid to O'Neill by Telesystem during such month in accordance with the terms and conditions of its employment contract with O'Neill, a copy of which is attached hereto as Schedule A and made a part hereof ("Employment Contract") and (ii) all the other costs and liabilities incurred during such month by Telesystem as employer of O'Neill. The Corporation hereby acknowledges having receipt (sic) copy of the Employment Contract and to be satisfied with the terms and conditions set forth thereof.(sic)

2.2 All services and sales taxes or similar taxes applicable to the monthly management fee shall be assumed and paid by the Corporation.

2.3 For purposes of clarity, it is hereby stated that the intention of the parties hereto is that Telesystem shall be reimbursed by the Corporation all the costs and expenses incurred under the Employment Contract and as the employer of O'Neill, save and except with respect to the O'Neill Option Agreement, as defined in the Employment Contract, which shall be assumed entirely and exclusively by Telesystem. For purposes of clarity, it is stated that the Corporation shall assume no liability of any nature whatsoever with respect to the said O'Neill Option Agreement.

2.4 If, at any time during the term of this Agreement, the Corporation puts in place a group benefit plan for its employees, including life insurance, then it hereby undertakes to make its best effort to maximize O'Neill coverage under such plan including, without limiting the generally of the foregoing, a minimum life insurance coverage of $1 million.

2.5 The Corporation shall grant directly to O'Neill, to the complete discharge of Telesystem's obligation under the Employment Contract, an option to purchase for up to $250,000 of common shares of the Corporation, namely 125,000 common shares at a price of $1.00 per share in 1994 and a total value of $125,000 of common shares in 1995 at the then applicable subscription price. Such option shall not come into force until the date of expiration of a five-month period following the formal date of execution of this Agreement. In addition, to facilitate the financing by O'Neill of these purchases of common shares of the Corporation, the Corporation shall advance $100,000 in respect to the 1994 subscription, to be reimbursed in 1998, and $100,000 in respect of the 1995 subscription, to be reimbursed in 1999. These advances shall bear interest at the prime rate and shall be secured by the common shares purchased, the whole in accordance with the terms and conditions more specifically detailed in the Employment contract.

2.6 All payments shall bear interest from the date such payment is due to the actual date of payment at a rate equal to the prime rate.

2.7 It is hereby agreed that there shall be no modification to the terms and conditions of the Employment Contract without the prior written consent of the Corporation, which consent cannot be unreasonably withheld...

Article 3

Term

3.1 Unless sooner terminated pursuant to the terms hereof, this Agreement shall have an initial term of two years and shall be automatically extended thereafter for consecutive one (1) year periods unless either party, at least one hundred and twenty (120) days in advance of the scheduled expiration date of the Agreement, notifies the other party of its decision to terminate at the end of the then current term.

3.2 Notwithstanding the foregoing, the Corporation shall be entitled to terminate this Agreement:...

3.2.2 immediately, for cause with respect to O'Neill services as President and Chief Executive Officer, at any time during the term of this Agreement subject to the receipt of a written notice to that effect stating in details the cause or causes for the termination;

3.2.3 without cause with respect to O'Neill services as President and Chief Executive Officer at any time during the term of this Agreement upon a sixty-day written notice to that effect;

3.2.4 immediately, without prior written notice, if O'Neill ceases, for any reason whatsoever, to be an employee of Telesystem;

...

3.3 Telesystem shall be entitled to terminate this Agreement:

3.3.1 immediately, upon a written notice to that effect, if O'Neill terminates the Employment Contract at any time during the term of this Agreement or otherwise ceases, for any reason whatsoever, to be an employee of Telesystem;

3.4 In case of termination of O'Neill services under paragraphs 3.2.1, 3.2.2, 3.2.3, 3.2.4, and 3.3.1 of this Agreement, then Telesystem shall provide to the Corporation the services of one of its competent senior executives to act on an interim basis as

president and chief executive officer until such time that a suitable replacement to O'Neill has been found to fill such position.

3.5 In case of termination of this agreement in accordance with the terms and conditions herewith, no party hereunder shall have recourse against the other party save and except for the payment of any amount due hereunder to Telesystem by the Corporation;

3.6 In case of termination of this Agreement, for any reason or cause whatsoever, the Corporation hereby acknowledges that Telesystem shall be entitled to terminate the Employment Contract within a period of four months from the date of termination of this Agreement. Except in case of gross negligence or fraud of Telesystem, it is hereby agreed that if the Employment Contract is so terminated by Telesystem, within the said period, then the Corporation shall reimburse Telesystem any severance payment, indemnity or any other amount paid by Telesystem to O'Neill as a result of the termination of the Employment Contract, as provided for by the Employment Contract. Any additional settlement to be entered into between Telesystem and O'Neill as a result of the termination of the Employment Contract shall be submitted to the Corporation for approval, which approval cannot be unreasonable withheld.

Article 4

Agency

...

4.2 The Corporation hereby recognizes that Telesystem has taken care in selecting O'Neill and that O'Neill has been accepted by the Corporation for the position of President and Chief Executive Officer. Moreover, the parties hereby agree that Telesystem shall not be liable, for any cause of action whatsoever, towards the Corporation for the acts of O'Neill even if O'Neill has exceeded the powers conferred upon him as President and Chief Executive Officer and/or as a director of the Corporation. The recourses of the Corporation under this Agreement shall be strictly limited to recourses against O'Neill.

7 The "O'Neill Option Agreement" mentioned in the Employment Contract, although never executed, was to "mirror and be subject to the T.E.L. Option Agreement". This latter agreement had been executed the same day as the Shareholders' Agreement and provides, amongst other things:-

2.1 The Corporation hereby grants to Telesystem an irrevocable option to purchase the number of Class A Non-Voting Shares determined in accordance with the terms and conditions set out herein.

2.2 The number of Class A Non-Voting Shares that Telesystem shall be entitled to subscribe hereunder shall be dependent upon the level of the Internal Rate of Return[5] on the Valuation Date[6]....

...

2.4 The purchase price for each Class A Non-Voting Share subscribed hereunder shall be $0.01 payable cash.

On January 1st of each of the following years, Telesystem shall acquire irrevocable vested right to subscribe to the portion indicated below of the total number of Class A Non-Voting Shares it is entitled to subscribe hereunder:

	1995			16 2/3%	
	1996			16 2/3%	
	1997			16 2/3%	
	1998			50%	
				100%	

In the event that the Calculation Period is shorter than four years, then, on January 1st of each year (starting on January 1st, 1995) during the Calculation Period, Telesystem shall acquire an irrevocable vested right to subscribe to a portion of the total number of Class A Non-Voting it is entitled to subscribe hereunder equal to 100% divided by the number of full years elapsed during the Calculation Period. The vested right acquired hereunder by Telesystem to subscribe to Class A Non-Voting Shares are hereinafter referred to as the "Vested Right." The remaining portion of the total number of Class A Non-Voting shares, Telesystem is entitled to subscribe hereunder which, at any time during the Calculation Period are not vested in accordance with this section shall be referred herein as the "Unvested Right".

6.1 Notwithstanding any provision contained herein, this Agreement shall not enter into force until the Board has approved the first business plan of the Corporation, but upon such approval it shall be deemed to have entered into force on the date of its execution.

8 By the terms of the Employment Contract, Martin O'Neill is also entitled to purchase "for up to $250,000. of (common) shares of (Microcell) over the (first) two years (of employment)".

9 Paragraph 4.2 of the Management Services Agreement underlines the fact that T.E.L. had "taken care in selecting O'Neill...". It knew that it had bargained for a "master marketer..." who:-

...made his reputation in the 1980's by turning first Braun Canada Ltd. and later Rubbermaid Canada Inc., two relatively small and low profile multinational branch operations, into stars.

and whose "strategy is to innovate with a vengeance"; described by one publication as:-

Smart and quick. Maybe too much so. Some industry watchers are beginning to hear that O'Neill is a bit bold for the controlling family, that his star may be on the wane within Bata. His audacious, sometimes imperious, style is rumoured to have alienated the "old shoe dogs" in the company and possibly hurt his ability to implement more far-reaching changes. Members of the Bata family are believed to be resistant to some of O'Neill's more radical and more to the point, costly plans.

O'Neill, likewise, is said to be frustrated at being denied the resources needed to transform the Canadian company from high-volume, low-margin provider cheap footwear into a more profitable position as "the premier fashion retailer at accessible price points." It's a classic clash of cultures, says one observer close to the company: "Martin is a marketing-driven guy, and this is a sales and manufacturing driven company."

10 As of February 7, 1994, Martin O'Neill was the Chief Executive Officer of a corporation holding a licence - one of three - granted by Canada to launch a new mobile telecommunication service in Canada but without employees, premises, equipment or clients. He immersed himself in the CT2+ Technology he was charged to bring to the market and began the process of hiring the "management team" that would ensure that Microcell be the first licencee with the best products to reach the marketplace. By the early summer of 1994, the team included:-

Marc Ferland	V.P. Distribution & Sales	Consulting for T.E.L.
Colin Holland	V.P. Gen. Mgr. - Western Region	Cantel
Gerry Vanderwael	V.P. Technology - Governmental affairs	Stentor
Claude Brisson	V.P. Engineering & Operations	Northern Telecom

Pierre Sarault	Director, Technology Development	Bell Canada
		Groupe
Bernard Elharrar	V.P. Finance	La Laurentienne

and a preliminary business plan, including a vision statement, was well developed. In July 1994, Microcell submitted an application to Canada for an experimental PCS licence, granted in September 1994.

11 Mr. O'Neill exercised his entitlement to purchase "125,000 shares (of Microcell) at a price of $1.00 per share in 1994".

12 By late October 1994, the team had concluded a contract with Ericsson for the supply of cordless telephones using the PCS Technology for prices and upon terms considerably more advantageous than those initially offered by Northern Telecom. In return for generous financing terms, Ericsson sought and obtained exclusivity. Assuming Microcell received a PCS licence, Ericsson would become Microcell's sole supplier of PCS cordless phones for the first 3 years. Charles Sirois was very critical of the exclusivity clause when he learned of it and directed that the contract be renegotiated to remove the offending clause.

13 Northern Telecom announced in November that it would no longer support the CT2+ Technology and would proceed instead to develop immediately the much improved PCS Technology. This decision, it seems, turned the entire industry on its head. The CT2+ Technology was dead. The scramble or "race" was now on to lobby Canada for a permanent licence to market the PCS Technology. Martin O'Neill and his team were back in the starting blocks and the mandate was modified. Instead of bringing a licensed technology to the marketplace, Microcell was now faced with the chore of first obtaining a licence from Canada to market the PCS Technology and then proceeding to bring such technology to the marketplace. The focus of the mandate had suddenly changed.

14 This change of focus coupled with Mr. O'Neill's insistance that the team move ahead simultaneously on two fronts - prepare for the licence application and develop the business plan to market the technology - produced early consequences. Martin O'Neill was by now reporting regularly to T.E.L.'s President, André Tremblay, who in turn reported to Charles Sirois. Cristiane Bourbonnais was hired away from Cossette in early December to become Vice-President, Marketing of Microcell. By mid-January 1995, she and several other members of the team had become upset and frustrated by Mr. O'Neill's behaviour and attitude towards them in particular and the team in general.

15 Charles Sirois asked André Tremblay to investigate this apparent "malaise". Mr. Tremblay chose to interview some of the team members. His summary notes of these interviews reveal that:-

> Le 23 janvier 1995
>
> Appel téléphonique de M. Ferland concernant la nécessité de garder C. Bourbonnais chez Microcell et la situation face à M. O'Neill.
>
> Selon M. Ferland, M. O'Neill a un comportement totalement inacceptable. Il se comporte de façon brutale avec les V.P. et il prendrait beaucoup de boisson. Selon lui, tout ça ne peut pas durer. Le 26 janvier 1995
>
> Rencontre avec Cristiane Bourbonnais
>
> **Re: Martin O'Neill**
>
> A peine trois semaines après son embauche, Cristiane Bourbonnais prétend qu'on (M. O'Neill) lui a fait des fausses représentations sur la nature de son emploi et regrette sa venue chez Microcell.
>
> Elle dit n'avoir aucun impact sur la stratégie marketing et y voit deux risques importants:

- Elle croit qu'advenant l'échec de la stratégie, elle sera désignée comme bouc émissaire;
- Elle redoute l'impact sur sa réputation dans le marché d'une stratégie marketing qui bat de l'aile à plusieurs points de vue.

Agissant comme membre de Cossette communication à titre de responsable du dossier "Bell Canada" et ayant été engagée à titre de spécialiste dans la mise en marché des produits de "Télécom-vois" elle ne comprend pas:

- Que Microcell ne tient pas profit de sa connaissance intuitive du marché, acquises à la suite de nombreux travaux et enquêtes de marché effectués pour le compte de Bell au cours des dernières années.

Le 30 janvier 1995
Rencontre avec Bernard Elharrar
Commentaires sur M. O'Neill
Autocrate, mégalomane et paranoïaque;
Aucun respect pour ses employés;
Très directif, n'accepte aucune discussion de ses positions; confond incompréhension et désaccord.
Produit un climat désagréable dans l'entreprise en exigeant des résultats inatteignables sans considérer les difficultés ou les empêchements et en rendant les employés responsables de l'atteinte de ces résultats.
Crée un climat où les employés se sentent obligés de se protéger. Un climat d'irritabilité et d'incohésion.
Grande démotivation.

16 Mr. Tremblay then referred the matter to Jean-Pierre Lefebvre of Bourbonnais who reported to him on February 8, 1995 that:-

Au cours des deux dernières semaines, mon associé Ron Drennan et moi-même avons rencontré sur une base individuelle, chacun des vice-présidents de Microcell, à l'exception de Pierre Saraud que nous ne connaissons pas. Cette initiative fut prise après que deux des vice-présidents, Cristiane Bourbonnais et Bernard Elharrar, nous eurent communiqué leur désir de remettre leur démission vu leurs malaises avec l'orientation que donne le président, et leur incompatibilité avec son style de gestion. Ces démissions pourraient avoir lieu aussi rapidement qu'après la réunion du Conseil du 13 février.

Constat

Ces mêmes malaises auxquels (sic) font référence Cristiane et Bernard sont également ressentis par Marc Ferland et, selon les ouïdire, par Pierre Saraud. Le dénominateur commun à leurs frustrations est l'étroite association qu'ils doivent maintenir avec Martin pour arriver à la formulation du plan d'affaires. Leur relation, individuellement et comme groupe, avec le président, s'est exponentiellement détériorée depuis novembre au point où la politesse et le respect les plus élémentaires sont disparus.

Les trois autres vice-présidents (Holland, Brisson et Vanderwel) reconnaissent que leurs collègues sont soumis à une incroyable pression. Ils gardent néanmoins un certain respect pour la "brillance" du président et croient qu'il apporte une valeur ajoutée à l'organisation bien que ses méthodes soient peu orthodoxes.

Les principales plaintes formulées tournent autour du style autocratique du président, de son despotisme intellectuel (accepte mal que l'on "challenge" ses idées), de son incapacité à responsabiliser ("micro-management), de son manque de rigueur intellectuelle (créativité prime souvent sur la discipline intellectuelle; contradictions et changements de cap sont fréquents quand de nouvelles idées lui arrivent), de son isolationnisme (prend des décisions sans informer les intéressés dans son équipe), de la préséance qu'il donne à la forme sur le fond ("pour vendre aux autorités

gouvernementales, au "Board", aux analystes, au grand public, tous les arguments sont bons; vivre avec les conséquences, c'est de l'opérationnel auquel on s'ajustera"). On rapporte que ces attitudes sont fréquemment ponctuées d'abus verbaux et même d'humiliations publiques à l'endroit de ses vice-présidents.

Conséquences

Même si certains de ces comportements étaient prévisibles au moment de l'embauche, étant en fait les manifestations du côté négatif de ses qualités (leadership charismatique, créativité effrénée, capacité supérieure pour la vente, négociateur astucieux), le départ des deux vice-présidents parmi les plus respectés par leurs confrères, serait un dur coup pour la crédibilité de Microcell. De Plus, en se fiant aux témoignages entendus, d'autres dangers pourraient menacer la viabilité long terme de la compagnie par exemple:

le lancement de produits perçus intuitivement comme excellents mais sans avoir été soumis à la rigueur de la recherche de marché;

une prévision de revenu peu rigoureuse, basée sur des hypothèses indûment optimistes;

une priorité accordée à des chapitres budgétaires finançant des activités d'éclat mais n'ayant aucune valeur résiduelle à long terme;

création d'un impact très favorable au moment du lancement des activités principales de la compagnie, avec engouement des consommateurs et des analystes financiers; affaissement total après le IPO et l'exercice des options.

and concluded that:-

Actions recommandées

Une intervention à très court terme, immédiatement suivant le Conseil du 13 février, devra, à mon avis, être considérée si on veut prévenir les dégâts. Certaines des pistes à explorer pourraient être les suivantes:

Adopter des arguments forts allant même au besoin (et si possible) à la garantie d'emploi chez Télésystème pour les deux vice-présidents défaillants (la vice-présidente marketing représente une ressource probablement unique en son genre dans l'industrie des télécommunications canadiennes).

Nommer un Chef de l'exploitation qui créera un esprit d'équipe parmi les vice-présidents, mettra en place le squelette auquel se greffera l'organisation et traduira en plan d'action cohérent la brillance de Martin O'Neill et de l'équipe toute entière.

Limiter le rôle de Martin à certaines interventions critiques pour lesquelles ses talents le rendra imbattable, comme par exemple avec les gouvernements, les médias, le public; utiliser sa créativité pour stimuler l'équipe plutôt que pour la diriger.

17 Mr. Lefebvre's recommendations apparently fell upon rocky ground. They were ignored at the time, although Charles Sirois and André Tremblay met to discuss them. Mr. Tremblay suggested that he be appointed Chief Operating Officer of Microcell to confront Mr. O'Neill. Mr. Sirois vetoed this proposal as premature and tantamount to a demotion. He still had confidence in Mr. O'Neill. Neither Mr. Tremblay nor any other senior officer of T.E.L. ever disclosed to Mr. O'Neill that his performance and deportment with the team were being monitored during this crucial period.

18 Despite the complaints, concerns and frustrations, the team soldiered on. The original draft business plan for the CT2+ Technology was revised, expanded and packaged into a licence application for the PCS Technology. Work continued on securing local area networks in Montreal, Toronto and other major centres.

19 On February 15, 1995, Martin O'Neill submitted his performance review for Microcell and the Microcell team for fiscal 1994 to André Tremblay:-

Subject: Microcell 1-2-1 performance review

Dear André,

Below please find the company objectives and achievements for 1994.
1) Develop a new corporate positioning, corporate logo and identity with a limited budget.
Achieved and approved
2) Identify, recruit and orientate a new management team.
Achieved
3) Supervise the recruitment a department teams capable of running the company.
Achieved
4) Finalise an acceptable contract for CT2 plus equipment with N.T.
Achieved
5) Develop a plan to overcome the deficiencies of the CT2 plus technology which could facilitate the successful market launch.
Achieved and approved
6) Initiated and developed first successful applications for 1.9 Ghz experimental licence.
Achieved
7) Microcell 1-2-1 moved rapidly from a second place position into clear leadership position by being first to engineer and successfully test 1.9 Ghz equipment in public environment. (Toronto + Montreal demonstration).
Achieved
8) Develop and launch successful campaign advertising and P.R. to establish Microcell as the leader in P.C.S.:
What is going on?
Freedom of expression, L.D. call demonstrations
What hath god wrought?
Official House of Commons announcement of our activity.
9) Negotiate and successfully complete a VENDOR financed equipment contract for experimental network.
Achieved
10) Identify and develop exclusive strategic alliance with major handset manufacturers to create compelling advantage for Microcell 1-2-1.
Achieved
11) Develop a new aggressive, creative and achievable business plan for Microcell.
Achieved
12) Acquire control of numbers:
Transfer from Bell successful
1.500 acquired
1.600 acquired.
Achieved
13) Develop strategic alliances to improve Microcell's competitive position:
Bell South Achieved
Pacific Bell Achieved
Mercury 1-2-1 Achieved
14) Identify and develop new business opportunities:
L.D. program
Card business
EAS business service
Achieved
15) Implement deployment of CT2 as per approved plan: - Over 3500 sites signed, including Montreal Subway (exclusively).

Achieved
16) Negotiate and finalise favourable contracts for Microcell 1-2-1:
Interconnection to Stentor
New premises
Long distance carrier
Achieved
17) Negotiate damages with N.T. to cover all Microcell's key equipment and operating costs for CT2 project.
Achieved
18) Develop and build a bank of strong family of product names that can be registered and used under the Microcell 1-2-1 brand name.
Achieved
As you can see, I believe in a relatively short time (nine months) the team has moved Microcell 1-2-1 forward quite significantly.
I also believe it was a very strong team performance and have therefore accrued the appropriate pro rata bonus for each of the management teams in the 1994 accounts.[7]
If you and Charles agree, I would like the discretion to award various amounts to the individual managers who I believed have contributed the most to achieving these fine results.
Merci. Let's discuss at your convenience. (Signed) Martin

20 This review led in mid-April 1995 to the granting by T.E.L. of bonuses to the Microcell management team for 1994 averaging 35% of 1994 salaries paid and included a bonus of $100,000. to Mr. O'Neill. All of these bonuses, save Mr. O'Neill's, were later paid.

21 The draft Microcell Business Plan was presented to André Tremblay by Mr. O'Neill and other members of the team on February 24th. Cristiane Bourbonnais abruptly left Microcell on March 3rd without giving any written notice.

22 Charles Sirois, André Tremblay and Martin O'Neill again met on March 13th to discuss the draft Business Plan prior to its presentation to the Board of Directors later in the month. The Board met on March 24th when the 1995 Business Plan and Budget were presented to it. The Minutes of this meeting record that:-

Key Issues and Assumptions Surrounding the 1995 Business Plan

Mr. Martin O'Neill makes a presentation concerning the corporation's licence application process and strategy, views of Canadian 2GHz contenders and on the four main budget strategies developed and applied by the corporation since the end of last year, which are:

1. adopt GSM technology standard;
2. prepare the licence application with target of July 1995;
3. prepare Montreal Island for commercial services readiness with target of October 1995, instead of the three city deployment strategy;
4. defer any expense which can be deferred.

Mr. Claude Brisson makes a presentation concerning namely, global systems for mobile communications ("GSM") technology standard, DCS 1900, comparison between DCS 1900 GSM technology and CDMA technology, switching network, sites and 1995 objectives. He also answers the questions of the directors on these matters.

Budget

The following documents are circulated to the directors for approval:

1. budget strategy;
2. funding requirements for 2nd and 3rd quarters 1995;
3. cash flow from operations for 2nd and 3rd quarters 1995;
4. network and operations capital expenditures for 2nd and 3rd quarters 1995;

5. PCS licence application and related expenses for 1995;
6. interest expenses and vendor debt analysis for 2nd and 3rd quarters 1995;
7. pro-forma financial statements for 2nd and 3rd quarters 1995; being the pro-forma income statement, pro-forma balance sheet and pro-forma statement of changes in financial position; all three being 2nd and 3rd quarter forecasts;
8. capital injection for 2nd and 3rd quarters 1995;
9. metrofone (handset) inventory for 2nd and 3rd quarters 1995.

All these documents are dated March 24, 1995 and are hereinafter named "budget".

Mr. Martin O'Neill makes a presentation concerning each document included in the budget and answers the questions of the directors on these documents.

Upon motion duly made and seconded, it is unanimously resolved to approve the budget.

ADOPTED

23 Four days later, the amended Ericsson supply contract was signed which, amongst other changes, removed the exclusivity clause considered offensive to Charles Sirois. In early April, Microcell announced that it had signed agreements with Northern Telecom and Ericsson for the supply of cordless telephones. At the same time it hired EDS Management Consulting Services Ltd. (EDS), a consulting firm, to "assist in the development of a successful... PCS Licence application".

24 Bernard Elharrar submitted his resignation on April 12th, effective May 5th, after finding new employment. In an affidavit sworn to on October 17, 1995, he succinctly summarized the period from February to April 1995 as:-

> ...une période de transition: renégociation du contrat de Ericsson, démission de Cristiane Bourbonnais, mise en attente du plan d'affaires, préparation d'urgence d'un budget pour les six prochains mois à la demande de M. André Tremblay, préparation d'une équipe pour la demande de licence, début des contacts réguliers entre les vice-présidents et André Tremblay, etc.

25 Bernard Elharrar was quickly replaced by Linda Paradis as V.P. Finance on April 18th. She came to Microcell from National Telesystem Ltd., the parent of T.E.L., and was instructed by André Tremblay to report directly to him. She was to be his eyes and ears. The second day on the job she invited Martin O'Neill to reimburse Microcell for gasoline expenses - Mt. Tremblant, Montréal, Mt. Tremblant - incurred when Mr. O'Neill returned from his Christmas vacation to reassure and comfort Ms. Bourbonnais in her new employment. This was no doubt a poor start to what was to become a very short relationship.

26 On April 27th the team met with representatives of EDS and another consultant, Terrance McGarty, to discuss the draft licence application. According to Linda Paradis:-

> 14. La réunion du 27 avril a consisté essentiellement en un échange, assez agressif je dois dire, entre Carl Aron, de EDS, et Martin O'Neill. Martin O'Neill donnait des réponses incohérentes, faisait des affirmations sans fondement que Carl Aron démolissait avec beaucoup d'aisance de par ses connaissances et compétences dans ce domaine. Vers la fin de la journée, Martin O'Neill quitta abruptement la réunion.
>
> 15. Après le départ de Martin O'Neill, j'ai demandé aux représentants de EDS qu'elles étaient les solutions pouvant permettre à Microcell de présenter une demande de licence d'exploitation PCS adéquate et en temps requis. Carl Aron m'a répondu que Microcell aurait davantage de chances de présenter une demande gagnante en prolongeant les vacances de Martin O'Neill.
>
> 16. Au moment d'une pause et à l'écart des autres membres de Microcell, je me suis présentée à Carl Aron et Charles Mason. À l'occasion de cette conversation, à ma demande, ils m'ont informée que, selon eux, la situation était critique pour Microcell et que mon évaluation très négative du plan d'affaires était fondée.

17. Le 27 avril en soirée, j'ai contacté André Tremblay à sa résidence pour lui donner mon opinion sur la situation chez Microcell que je trouvais dramatique. Selon moi, suite à diverses conversations et réactions du management, Martin O'Neill abusait de ses pouvoirs, faisait preuve de manque d'éthique et n'avait aucunement le leadership nécessaire pour diriger Microcell.

27 It is evident that within 10 days of joining Microcell, Linda Paradis had formed strong opinions concerning Mr. O'Neill. Terrance McGarty, in a letter to Mr. O'Neill of April 30, 1995, described this meeting as:-

...unlike anything I have ever experienced in a business meeting before. Your initial presentation was to focus the groups interest on the objectives with a clarification of the business per se, but with the overall intent of moving forward as a team in accomplishing the task of preparing and submitting the best proposal to the Canadian Government.

You were clear, precise, and direct in setting up the issues. In contrast, the EDS team seemed to have other objectives, never stated, but clearly acted upon in a most disruptive fashion. Their focus on such items as the inappropriateness of the company name, the ad hominum attacks on individual's competencies, and the desire to show how Microcell was "wrong", with no positive contribution, was from my perspective both non-productive as well as counter productive.

The most upsetting part of the meeting was when you left and Carl Aron indicated that the only way to get the proposal finished was if "the person who is not now here stayed on vacation for ninety days...". This was said in front of your staff and myself. I have never seen such unprofessional behavior in all my career, most of which has been in the New York area, where one may have anticipated such. In fact, even in the most confrontational moments in the business world, people generally deal with each other with civil, professional and respectful conduct, and one never degrades the customer in front of his staff.

28 The following day André Tremblay met with Carl Aron and Charles Mason of EDS and Linda Paradis to review the events of the previous day. In his words:-

26. Lors de cette rencontre, Carl Aron a été très sévère à l'endroit de Martin O'Neill. Selon lui, Martin O'Neill dirigeait par intimidation, était dépassé par les événements et n'était pas en mesure de mener Microcell à l'obtention d'une licence pour l'exploitation d'un système de téléphonie PCS. Carl Aron me dit qu'il avait conclu des réunions tenues avec l'équipe de direction de Microcell que les membres de cette équipe étaient totalement démotives, que le climat était malsain, que personne n'avait comme priorité de préparer la présentation de la demande de licence d'exploitation et que Microcell ne serait jamais en mesure de faire une telle demande, à moins de changements radicaux. Il a ajouté que Martin O'Neill mentait, n'avait pas de respect pour ses troupes et qu'il les démotivait.

He then set about to interview all of the Vice-Presidents in early May 1995 and concluded from these meetings that Martin O'Neill should be relieved from his functions, since:-

28. ...il est ressorti de la majorité, on ne peut plus clairement, que Martin O'Neill avait perdu la confiance de ses vice-présidents. Ces derniers étaient extrêmement critiques à l'endroit de Martin O'Neill. Certains ont référé à son manque de leadership, de profondeur, de crédibilité et d'éthique; d'autres ont dit qu'il adoptait des façons de faire inacceptables lors de réunions, qu'il n'était pas ouvert à la discussion, qu'il divisait pour régner, tous se plaignaient d'un manque de cohésion, de coordination et d'esprit d'équipe chez Microcell.

and he recommended such action to Charles Sirois on May 8th. This time Charles Sirois accepted Mr. Tremblay's recommendation and at noon on May 12, 1995, he met with Martin O'Neill to dismiss him, effective immediately, and:-

> 34. Je lui offris ensuite de lui verser un montant correspondant à son salaire pour une année complète de travail et de demeurer actionnaire de Microcell compte tenu des actions achetées durant l'année 1994 en vertu de son option d'achat d'actions incluse dans son contrat d'emploi. Je lui dis enfin de retourner chez lui, de penser à cette offre et fixai une seconde rencontre le 17 mai 1995.

Messrs. Sirois and O'Neill met again on May 17th when:-

> 36. Martin O'Neill exigea alors que je lui accorde toutes les options qui étaient incluses dans son contrat d'emploi, soit l'achat d'actions pour une valeur de 125 000$ pour l'année 1995 et la participation au <Tel Option Agreement.
>
> 37. Je refusal de lui accorder ces options puisque je considérais que celles-ci étaient liées à son emploi et qu'elles n'étaient que des mesures pour l'inciter à diriger adéquatement Microcell.
>
> 38. J'offris par ailleurs à Martin O'Neill de l'engager à titre de consultant auprès de Microcell afin de mettre à profit ses talents et connaissances en marketing.
>
> 39. Martin O'Neill refuse ces offres.

Mr. Tremblay succeeded Mr. O'Neill as President of Microcell.

29 Mr. O'Neill instituted his action for wrongful dismissal and his Petition for Relief under section 241 of the Act in June 1995. These proceedings have been amended several times, the last being on October 11th and 28th, 1996 respectively. Defendants produced a Reamended Defense and Contestation on November 1, 1996. The proceedings were joined for trial and heard commencing November 4th over a period of 12 days. The Court took the matter en délibéré on November 19th, 1996.

Submissions of the Parties

30 Defendants submit that Martin O'Neill was dismissed for just cause-a serious reason[8] - in that he (a) failed to complete his mandate to "develop a long range plan..." by the end of "...the first quarter of 1995...", (b) demonstrated an absence of leadership, (c) was an incompetent chief executive officer and (d) lacked integrity.

31 Martin O'Neill denies that he was dismissed for a serious reason[9] and replies that he was the victim of a conspiracy to deprive him of his position and the contractual benefits to which he is entitled, engineered by André Tremblay in concert with one or two disaffected Vice-Presidents. These benefits include accrued share purchase, pre-emption and option rights which Defendants refuse to grant him beyond those already approved.

32 In this latter connection, Mr. O'Neill asserts that he has not been treated like the other shareholders of Microcell, particularly with respect to his pre-emption rights. This is at the root of his application for relief pursuant to section 241 of the Act.[10]

Conclusions

A) Dismissal for Cause

33 Was Martin O'Neill dismissed for reasons that permit T.E.L. and Microcell to avoid their obligations assumed under the Employment Contract and Management Services Agreement? To do so, they must establish that Mr. O'Neill was dismissed "for cause".[11] A serious reason for dismissal includes a breach by the employee of an essential condition of the employment contract or reprehensible conduct in the exercise of his or her work.[12]

34 Charles Sirois says he dismissed Mr. O'Neill as he no longer thought he had the competence to be Microcell's Chief Executive Officer. Mr. Sirois had lost confidence in his ability to lead the Microcell team in its quest for a PCS licence.

35 Mr. Sirois' dismissal of Martin O'Neill was certainly not without some foundation. Several members of the team were critical of Mr. O'Neill's management style and deportment. They

were frustrated and demoralized. Their "malaise" was monitored by André Tremblay from late January 1995 to the time of his dismissal. By mid-April 1995, two members of the team had resigned. The EDS representatives then added insult to injury by their vigorous attack on Microcell's business plan, licence application and it's president, all in the presence of the team. This aggressive action - Pierre Sarault opined that the EDS representative "a démoli le plan" - may well have destroyed whatever credibility Martin O'Neill still enjoyed from amongst the disaffected members of the team.

36 But not all of the members of the team were disaffected, amongst them, Gerald Vanderwael and Collin Holland. Mr. Vanderwael was recruited to Microcell through Bourbonnais and hired in early July 1994 by Mr. O'Neill as Vice-President, Technology and Government Affairs, based in Toronto. He was very impressed with Martin O'Neill and "what he could do". Following the abandonment of the CT2+ Technology, Mr. Vanderwael was assigned to the PCS licence application with Messrs. Sarault and Ferland, while the rest of the Montreal team concentrated on the parallel development of a business plan. Shortly after Microcell received a permanent licence to market the PCS Technology in December 1995, Mr. Vanderwael was let go.

37 Mr. Holland joined Microcell in April 1994 as Vice-President, Network Operations, based in Vancouver. He participated initially in the building of the business plan to market CT2+ Technology, later referred to as the "Shamrock Document". He too was and is very impressed with Mr. O'Neill's operating, marketing and even singing[13] skills. As with Mr. Vanderwael, Mr. Holland was terminated by Microcell in early 1996.

38 Both Messrs. Vanderwael and Holland testified that Mr. O'Neill put considerable pressure on people, he was demanding, he "challenged us". Mr. Vanderwael believes that the change in focus of the mandate placed enormous strains on the team. Some of its members did not handle this sudden change as well as others. Some even resisted change. Mr. Holland described Martin O'Neill as "charismatic", "dynamic", "sharp", "a quick study", a person who "operated at a high conceptual level" and felt it was up to the rest of the team to "keep up".

39 Michael Cullen, hired in January 1995 as a Vice-President Sales for the Ontario region, based in Toronto, also testified for Mr. O'Neill. He spoke of the change in atmosphere at the Montreal office beginning in late February 1995 when it was "not so pleasant to work there". Mr. Cullen reported to Marc Ferland who had early on confided that he was well connected to the T.E.L. people. This was borne out about a week before the dismissal, when Mr. Ferland "filled me in on O'Neill" and told me that he was likely to be fired - "he's going to be gone".

40 Senior officers of corporations have been dismissed for a variety of serious reasons - conflict of interest[14], gross misconduct[15], dishonesty[16], contravening company or professional policies[17], conduct incompatible with duties and prejudicial to the business[18], poor interpersonal relations with staff and clients[19], insubordination combined with alienation of staff[20], incompetence[21], sloppy management practices[22] - relieving an employer from the obligation of giving reasonable notice or an indemnity in lieu of such notice.

41 On the other hand, a Chairman may be justified in concluding that his President "does not have the managerial qualifications required to do the job he had been engaged to do, and yet, (he) may not have just cause to dismiss him summarily"[23]. The burden of showing "just cause" is a difficult one[24]. Senior officers are frequently dismissed for valid reasons that do not amount to "just cause" - failure to meet deadlines[25], authoritarian management style creating a serious morale problem[26], alleged disobedience and insubordination[27] - thereby requiring the employer to pay damages for failure to give reasonable notice.

42 As noted above, Defendants raise four essential grounds to justify their claim that Mr. O'Neill was dismissed "for cause". They are:-

1. Failure to complete mandate to develop a long range plan by March 31, 1995.

43 This "contractual" mandate was modified in November 1994 and complicated by events requiring Microcell to focus its primary effort on securing a PCS licence. Notwithstanding this change of focus and the enormous strains it placed upon the team, the 1995 Budget, including the essential elements for the 1995 Business Plan had been approved by the Board by March 24th. This ground is without merit. Even if founded, it alone would not be sufficiently serious to support a dismissal "for cause".

2. Absence of leadership

44 Defendants justify this accusation by pointing to (a) the resignations of Mr. Elharrar and Ms. Bourbonnais, (b) the demotivation of Messrs. Brisson and Ferland, (c) the critical comments of Mr. Sarault, particularly as regards Mr. O'Neill's lack of knowledge in the field of communications and (d) Mr. O'Neill's alleged arrogant behaviour towards his Vice-Presidents during the first quarter of 1995.

45 The growing tensions between the disaffected members of the team and Martin O'Neill are at the root of his dismissal. Charles Sirois considered that Mr. O'Neill's mission was to build a team to market "un réseau CT2+" as soon as possible. He conceded that this mission changed with Northern Telecom's abandonment of the CT2+ Technology and that applying for a PCS licence was going to be a very difficult and very expensive exercise, requiring a team that was both disciplined and focused. Mr. Sirois feels that Martin O'Neill failed, as of May 1995, to deliver such a team and that he was not going to present a successful licence application on time in the circumstances. He became convinced that Mr. O'Neill was not the man for the job that had been entrusted to him.

46 Clearly, there was dissension in the ranks and the President had seemingly failed to resolve this "malaise" by May 1995. He was aware that all was not as it should be at least six weeks before his dismissal. He describes the first quarter of 1995 as a very difficult time and acknowledges that some members of the team reacted to the stresses and strains with "passive resistance". He did not, it seems, appreciate the extent of dissatisfaction and frustration. André Tremblay, who was monitoring the "malaise" never warned Mr. O'Neill of it. Nor it seems did anyone else. Mr. Tremblay treated the interviews with the team members as confidential. They, it seems, believed their complaints had been planted in fruitful soil. Martin O'Neill was left to sink or swim. In the result he was torpedoed by members of his crew[28] with the tacit encouragement of the admiralty. The blame - if blame is to be assigned - for this unhappy state of affairs has to be shared. It must be remembered that Mr. O'Neill was not hired for his knowledge in the communications field, as Mr. Sarault may have erroneously assumed.

3. Incompetence

47 Defendants contend that Mr. O'Neill demonstrated that he was an incompetent Chief Executive Officer when he signed the Ericsson contract in October 1994 without having first obtained Board approval. Mr. O'Neill asserts he had approval to secure an assured supply of equipment using PCS Technology. He pursued Ericsson when it became apparent that Northern Telecom was reluctant to negotiate for PCS equipment at a time when it was still promoting CT2+ Technology. Martin O'Neill was anxious to conclude such a contract given the excellent pricing and financing terms offered by Ericsson.

48 This was evident, as the team was prepared to grant exclusivity in return for such favourable terms. It is this decision that angered Mr. Sirois when he learned of it in November 1994. The exclusivity clause was later re-negotiated out of the contract although not without some cost.

49 This was not incompetence; far from it. Mr. O'Neill struck while he thought the iron was hot. In the result, it probably served to awaken the "sleeping giant" at Microcell's back door, such that Microcell signed new and renegotiated supply contracts respectively with both Northern Telecom and Ericsson in April 1995.

4. Lack of integrity

50 Defendants argue that Martin O'Neill lacks integrity as he (a) failed to inform the Board in a timely fashion of the execution of the Ericsson contract; (b) improperly incorporated into the draft business plans the works of others - plagiarized[29]; (c) improperly used pictures of famous people or characters on sample phone cards without permission and (d) failed to respect Mr. McGarty's request that his letter of April 30, 1995 (reproduced in part above)[30] be treated as confidential.

51 These charges, amongst others, are misleading, largely false, taken out of context and reflect more on the integrity of those advancing them than of their subject. There is absolutely nothing in the evidence to support an attempt by Mr. O'Neill to hide from the Board the fact a contract had been signed with Ericsson. As Chief Executive Officer, he believed he had the necessary authority to bind the company. He had prior approval in principle to secure a supply of PCS compatible equipment. Mr. Sirois knew of it within a month of its execution.

52 The charge of "plagiarism" can perhaps best be put in perspective by Tony Chapman, a Microcell consultant hired to "support and augment the communications and marketing strategies for Microcell". Here is what he said about "phone cards" and "brochures":-

Phone Cards

7. In an effort to subsidize the cost of a PCS Home station, at the lowest possible cost to **Microcell, Martin O'Neill** developed a strategy to offer long distance phone cards as a rebate to consumers.

8. Martin O'Neill researched the PrePaid phone card market and saw an industry that was developing quickly in Europe and the United States but almost non existent in Canada.

9. To determine if there was a possibility of covering off two objectives, a low cost/high perceived value subsidy for PCS consumers, while tapping into a potential high growth market, Martin O'Neill asked us to create a number of different cardboard card prototypes of the cards and a trade brochure. The cards had no numbers, they featured no magnetic strips, and they were oversized. The purpose of the prototype was to introduce the concept to potential retailers distributors and licensing partners without incurring a lot of investment.

10. CAPITAL C made a point of asking Martin O'Neill, on two occasions, whether any of these prototype cards would be exposed in any way to the consumer. We were told explicitly that the cards and trade brochure would only be shown to the Board of Directors and to a select group of potential retail partners and that no consumer, even in focus group research, would be exposed to the prototypes.

11. We proceeded with the clear understanding that it was not intended to enter the public domain or to be published or printed in any form.

12. It was always Mr. O'Neill's intention to obtain the necessary copyright and trade mark authorization, assuming that any of the cards would be developed for market. Although organizations like Thomas Cook and The United Way were open to the concept, after seeing the prototypes, the overall concept was discontinued as the focus shifted to winning the PCS licence application;

Brochure

13. As part of the development of marketing ideas and as a refinement of a telephone card project started in the fall of 1994, in early January 1995, Martin O'Neill had a brochure prepared for the promotion of telephone cards on which appeared the likeness of leading international personalities, brand-names and corporate logos;

14. The purpose of this brochure was to illustrate, to a very trade restricted audience, the type of phone cards which Microcell could produce; it was not intended to enter the public domain or to be published in any form whatsoever;

15. It was always Mr. O'Neill's intention to obtain the necessary copyright and trade mark authorisations if we could generate sufficient interest using the brochure; in this regard, Mr. O'Neill...

16. The use of such a promotional brochure is common;

53 To characterize the incorporation of portions of the Frost and Sullivan Report into Microcell's business plans as plagiarism, with or without acknowledgement, is equally specious and damaging. Business plans are very private and confidential documents. They are not intended for public viewing. Business plans are not published. They are internal, secret, working documents. Admittedly, as happened in this case, portions of such plans are sometimes shown to prospective suppliers, but always on a strictly confidential basis.

54 Plagiarism connotes publication, a holding out to others that the work of another is one's own. This is not the case when research material or analyses of experts in the communications field are put into a business plan to support that plan's objectives. It would be entirely different if Microcell was in the business of selling business plans, which it is not. As of May 1995, Microcell's business plans and licence application were all highly confidential draft documents.

55 In sum, this Court does not believe that Defendants have succeeded in demonstrating "clairement et objectivement l'incompétence flagrante"[31] or any other serious reason for the dismissal of Mr. O'Neill. On the contrary, Mr. Sirois wanted to continue the relationship to benefit from Mr. O'Neill's marketing skills by retaining him as a consultant. He dismissed him as he had lost confidence in his ability to motivate the team. In Mr. Sirois' view, he was not going to measure up[32].

56 Mr. O'Neill was given no warning that some members of the team were disgruntled and dissatisfied with his leadership despite the fact he was regularly in contact with Mr. Tremblay[33]. In all the circumstances, this Court believes there is more substance to the conspiracy theory than there is to a dismissal for cause.

B) Contractual Damages

57 Most of the damages properly due to Martin O'Neill as a result of his summary dismissal can be determined with reference to the Employment Contract, the Management Services Agreement and the Shareholders Agreement. The Employment Contract specifically provides for an entitlement to claim $250,000. - base salary for one year - in the event of dismissal. Mr. Sirois undertook for Microcell and T.E.L. to pay this sum. The Court will enforce it. The actual words used stipulate that "in the event of dismissal ... you will be entitled to claim $250,000., except for the first 5 months of your employment, during which time you will not be entitled to a severance package". Since Mr. O'Neill was dismissed after 16 months, he is therefore entitled to a "severance package".

58 What is Mr. O'Neill's "severance package"? The Court considers that it includes, besides the base salary for one year, all of the other emoluments or benefits described in the Employment Contract that would be payable or claimable within the severance period. These include specified benefits such as an annual contribution to his RRSP ($21,895.), "selected expenses" - a car and club allowance - to a maximum of $24,000. and, arguably, a relocation allowance back to Ontario. It also includes Mr. O'Neill's entitlement to bonus payments and to subscribe for $125,000. worth of common shares of Microcell for 1995 - against which he has made a notarial tender of the said sum of $125,000. - as well as the pre-emption rights flowing from such subscription. While still employed, he became entitled as of January 1, 1995 to subscribe for a number of Class A non-voting shares of Microcell pursuant to the intent of the O'Neill Option agreement.

1. Monetary Damages

59 The monetary damages amount to $605,895. as follows:-

1.1 Base salary and Specified Benefits: $295,895.

60 This amount is made up of Mr. O'Neill's base salary for one year ($250,000.), an annual contribution to his RRSP ($21,895.) and "selected expenses" ($24,000.).

1.2 Relocation Allowance: $60,000.

61 It is clear from the Employment Contract that Mr. O'Neill was lured from Ontario to Québec at company expense and that the engagement was intended to be a lasting one, at least four years. The dismissal put an abrupt end to any long term arrangement obliging Mr. O'Neill for all practical purposes to return to Ontario where his opportunities for new employment are best. The expenses associated with a return to Ontario, brought about by the dismissal, were entirely forseeable[34] when the contract was concluded. The Court assesses these damages as amounting to at least $60,000., being the preestimate of the cost to bring Mr. O'Neill to Québec. They no doubt include payment of a real estate commission for the sale of his Beaconsfield house, moving out and moving in expenses and expenses associated with the purchase of a house in Ontario.

1.3 The 1994 Bonus and the Guaranteed Bonus: $250,000.

62 The Employment Contract provides that Martin O'Neill "will be entitled to a yearly bonus based on performance ... in a range of 32% to 48% of ... base salary, with a target of 40% for meeting objectives ...". The bonus that Mr. O'Neill thought he was to receive was $100,000., or 40% of base salary. The evidence discloses that the 1994 bonuses were not to exceed 35% of salaries in the aggregate. Mr. O'Neill was therefore entitled to receive a bonus in April 1995 at least equal to 35% of his base salary, or $87,500. The Court will so order as the Chairman and the Board of Microcell have so far failed to do so.

63 Mr. O'Neill is guaranteed bonus payments of $250,000., whether annual or one time, payable "as late as the end of 1998". The Court will invite T.E.L. and Microcell to respect this guarantee and order the payment of $162,500. ($250,000. - $87,500.) on December 31, 1998.

2. Shares and Related Rights

64 Mr. O'Neill is also entitled to receive shares or options to purchase shares of Microcell. These include:-

2.1 The "1995 Shares"

65 Again, the Employment Contract provides Mr. O'Neill with an entitlement "to purchase shares in 1995 for up to $125,000. at the then applicable subscription price". He asked Mr. Tremblay for these shares prior to the March 24, 1995 Board Meeting when the price for each such share was $1.00. Mr. Tremblay did not add this request to the agenda for that meeting. Following his dismissal, Mr. O'Neill tendered $125,000. to Microcell against delivery of an equivalent number of Microcell common shares. The tender was made in June 1995. The Court will order Microcell to issue 125,000 common shares in its capital stock to Martin O'Neill as of March 24, 1995 and declare the tender amount good and sufficient consideration for such shares.

66 Orders will also be made to ensure that Microcell respects Mr. O'Neill's preemption rights under the Shareholders' Agreement with effect retroactive to March 25, 1995. These orders are contemplated in the conclusions added to Defendants' défense réamendée[35] wherein offers are made "pour les cas où cette cour jugerait que le demandeur a droit aux <actions de 1995" or "des droits de préemption afférants aux <actions de 1995" subject to payment of the issue price for all such shares plus interest and the indemnity contemplated in article 1619 C.C.Q. The Court will not order interest or the indemnity to be paid in circumstances where the Defendants refused to issue these shares when they were requested.

2.2 Options to purchase Class A non-voting shares

67 The Employment Contract stipulates that Mr. O'Neill:-

> will be granted options to purchase shares of (Microcell) pursuant to ... the O'Neill Option Agreement which (he) will enter into with ... T.E.L. ... the purpose of (which)

will be to entitle (him) to a portion of the benefits accruing to T.E.L. under the T.E.L. Option Agreement.

The O'Neill Option Agreement was never executed but it was to "mirror and be subject to the T.E.L. Option Agreement". This latter agreement was intended to reward T.E.L. for its management of Microcell. The measure of the reward lay in the ability of management to achieve Microcell's objectives, realisable on the earlier of the year 2000 and going public. The options represented an incentive to manage well. It is a performance based form of remuneration.

68 As the O'Neill Option Agreement was to "mirror and be subject to the T.E.L. Option Agreement", it too is a performance based form of remuneration. T.E.L.'s "irrevocable vested right to subscribe" for Class A non-voting shares of Microcell will subsist for so long as it continues to manage Microcell. Likewise, Martin O'Neill's vested right would subsist during his employment as Microcell's Chief Executive Officer.

69 Mr. O'Neill earned his right to subscribe for Class A non-voting shares as of January 1, 1995 based on his 1994 performance. However, as mentioned in the Notes to Financial Statements of Microcell for its fiscal year ending December 31, 1995, the number of such shares under option:-

> will depend upon the level of the annual internal rate of return on the funds invested in common and Class A non-voting shares by the shareholders of the Company for the period ending on the earlier of (i) the date of closing of the Company's initial public offering and (ii) April 1, 2000.

The "initial public offering" has not yet occurred, notwithstanding a public offering of "Units" made in the United States last June consisting of redeemable discount notes and warrants to purchase a new class of shares other than "common and Class A non-voting shares. Thus, the number of Class A non-voting shares subject to Mr. O'Neill's "irrevocable vested right" as of January 1, 1995 are not yet calculable. The Court will therefore make an order requiring T.E.L. to grant Mr. O'Neill the number of "Optioned Shares" he is entitled to receive as of January 1, 1995 under the "basic terms and conditions of the O'Neill Option Agreement" outlined in the Employment Contract on the earlier of the above mentioned two dates, against payment of the option price of $0.01 per option.

70 The Court estimates that Mr. O'Neill's right to purchase Class A non-voting shares will be at least as beneficial as the rights accorded to members of the team pursuant to the Stock Option Plan for Designated Executives of Microcell, that is, an "initial grant of options equal to 1.5 times his Base Salary divided by the Subscription Price".

3) One-time Bonus

71 Mr. O'Neill claims an amount of $630,500., being one half of a potential one-time bonus "payable in 1999 based on meeting three key performance criteria over the 1995 - 1998 period", namely:-

> cumulative net operation revenues for the 4-year period;
> cumulative operating cash flow for the 4-year period; and
> return on average capital employed (RACE) (measured by reference to cumulative net operating cash flow and average capital employed) for the 4-year period.
> The amount of this one-time bonus will be a function of the extent to which target levels are attained and exceeded, based on a scoring system...

To earn this bonus, Martin O'Neill had to have stayed the course through 1998. He did not.

C) Moral Damages

72 Mr. O'Neill was dismissed peremptorily. He was offered his base salary for a year and a consulting contract "de mettre à profit ses talents et connaissances en marketing". He asked as well for his bonus, the "1995 shares" and all his option rights. These were all refused. To

support these refusals, or some of them, Defendants had to resort to a defence of dismissal for cause.

73 Some of the unproved and reckless charges - including incompetence and plagiarism - are by their nature defamatory and "porte atteinte à la réputation"[36] of Mr. O'Neill. These charges have been shown to be false and taken out of context. Defendants were imprudent in advancing them and by so doing they have caused damages to Mr. O'Neill. He has yet to find permanent employment. These damages are not contemplated by the Employment Contract. They result from a calculated decision by Defendants to vigorously advance a defence of dismissal for cause. They have failed. Accordingly, Mr. O'Neill is entitled to an indemnity under this head which the Court estimates should be in the order of $15,000.

D) The Oppression Remedy

74 Martin O'Neill complains that the refusal of Microcell to issue him the "1995 Shares" and the options to which he is entitled pursuant to the Employment Contract is "abusive" and "unfairly prejudices (his) interests". Microcell raises a host of procedural and substantive reasons why this Court should not grant the relief Mr. O'Neill seeks.

75 Included amongst the procedural grounds, Microcell alleges that this application is brought in violation of the arbitration clause[37] in the Shareholders' Agreement. This clause stipulates that any dispute between "the Parties concerning *any matter arising under this Agreement* shall be submitted to and finally resolved by arbitration". Article 940.1[38] of our Code of Civil Procedure requires the Court in such circumstances to refer the parties to arbitration save in two cases, neither of which apply to this matter.

76 However, Mr. O'Neill's dispute with Microcell and T.E.L. has nothing whatever to do with the interpretation or enforcement of any of the terms of the Shareholders' Agreement. Rather, it lies in his dismissal as Microcell's President and Chief Executive Officer and Defendants' refusal to honour various terms of the Employment Contract to which Microcell became bound by virtue of the Management Services Agreement, notably paragraphs 2.3 and 2.5 thereof[39]. The dispute involves the enforcement of rights and obligations stipulated in these two agreements following a dismissal. The arbitration clause in the Shareholders' Agreement has not been violated.

77 Microcell also asks that this remedy be dismissed as it is unnecessary (inutile). The Court agrees with this submission but not for the reasons advanced by Microcell.

78 Everything that Martin O'Neill seeks to obtain as a result of his wrongful dismissal, save moral damages, has its nexus in the Employment Contract and the Management Services Agreement. The Court has already indicated all that it is prepared to grant to compensate for Mr. O'Neill's damages. In the special circumstances of this case, Mr. O'Neill does not require relief under the oppression remedy. The Court can give him the relief to which he is entitled under the civil law of contract and of delict.

79 Absent the Employment Contract and the Management Services Agreement, Mr. O'Neill may have had to rely on the relief provided by the oppression remedy under the Act. In such circumstances, this Court would not hesitate to grant such relief. Mr. O'Neill has standing, whether as shareholder, officer, creditor or a "proper person"[40] to apply for relief from oppression under Part XX of the Act and this, notwithstanding that he is also a former employee seeking damages for wrongful dismissal.[41] Our Courts have not denied standing to a shareholder to seek relief under oppression remedies simply because he or she was also a disgruntled employee,[42] particularly:-

> where the (wrongful dismissal) constituted a breach of the underlying expectation of the (employee) arising from the circumstances in which the (employee's) relationship with the corporation arose.[43]

80 Mr. O'Neill's interests as a shareholder of Microcell and his contractual rights to subscribe for additional shares or options were certainly prejudiced as a result of his dismissal.

Similarly, his rights as a creditor of T.E.L. pursuant to the O'Neill Option Agreement were denied following the dismissal. Arguably, Mr. O'Neill had a reasonable expectation that his relationship with Microcell and T.E.L., whether as officer, shareholder or creditor, would at least survive the events contemplated in the Employment Contract and in the T.E.L. Option Agreement.[44]

E) Charles Sirois as Defendant

81 There is nothing in the proof adduced during 12 days of trial to support a personal condemnation against Charles Sirois. His role in the dismissal of Martin O'Neill was played out as Chairman of Microcell's Board of Directors. He dismissed Mr. O'Neill based on what he knew and had been told by André Tremblay at the time. The decision, when taken, was businesslike. The manner of the dismissal was likewise businesslike, albeit abrupt. Mr. Sirois made an offer to Mr. O'Neill at the time of dismissal and allowed several days for a response. The abuse suffered by Mr. O'Neill in this unhappy saga has come from the disgruntled members of the team and from Mr. Aron of EDS - who had his own axe to grind - and not from Mr. Sirois.

For these Reasons, The Court:-

82 *MAINTAINS* in part Plaintiff's Re-amended, Reparticularized action;

83 *DISMISSES*, as unnecessary in the circumstances, Plaintiff's Second Re-amended Application for Relief from Oppression Pursuant to Section 241 of the Canada Business Corporations' Act.

84 *MAINTAINS* the defence of Defendant, Charles Sirois, and *DISMISSES* the action as against him;

85 *CONDEMNS* Defendants, *Microcell Telecommunications Inc.* and *Telesystem Enterprises (T.E.L.) Ltd.*, solidarily to pay Plaintiff the sum of $458,395. with interest and the additional indemnity contemplated in article 1619 C.C.Q. from service of the action;

86 *ORDERS* Defendants, *Microcell Telecommunications Inc.* and *Telesystem Enterprises (T.E.L.) Ltd.* solidarily to pay Plaintiff the further sum of $162,500. on or before December 31, 1998, with interest thereon and the indemnity contemplated in article 1619 C.C.Q. after such date and until paid;

87 *DECLARES* Plaintiff's tender and deposit valid and sufficient for the purchase of 125,000 common shares of Defendant, *Microcell Telecommunications Inc.* as of March 24, 1995;

88 *ORDERS* Defendant, *Microcell Telecommunications Inc.*, to issue a share certificate to Plaintiff for the said 125,000 common shares as fully paid and non-assessable, with effect retroactive to March 24, 1995; and to note such issue in its books and registers;

89 *ORDERS* Defendant, *Microcell Telecommunications Inc.*, to offer to issue to Plaintiff all of the "Additional Securities" to which he is entitled by virtue of this judgment and in consequence of all issues of Additional Securities made in accordance with the provisions of Section 4 of the Shareholders' Agreement and thereafter to issue share certificates to Plaintiff for the number of common shares taken up and paid for by Plaintiff in response to such offer(s) with effect, in each case, retroactive to the dates such Additional Securities were or should have been first offered and to note all such issues in its books and registers;

90 *ORDERS* Defendant, *Telesystem Enterprises (T.E.L.) Inc.*, to transfer to Plaintiff on the earlier of (i) the date of closing of the initial public offering of *Microcell Telecommunications Inc.* and (ii) April 1, 2000 all of the options to purchase Class A non-voting shares of *Microcell Telecommunications Inc.* that Plaintiff is entitled to receive as of January 1, 1995 under the basic terms and conditions of the O'Neill Option Agreement outlined in the Employment Contract against payment of the option price of $0.01 per option;

91 *THE WHOLE WITH COSTS* in favour of Plaintiff and solidarily against Defendants *Microcell Telecommunications Inc.* and *Telesystem Enterprises (T.E.L.) Inc.* as for an action of $750,000.

J. TINGLEY

Me James A. Woods and *Me Nathalie Chalifour*, Attorneys for Plaintiff.
Me Pierre Cimon, Me Pierre Bienvenu, Me Jean-Sébastien Bernatchez, Attorneys for Defendants.

Action allowed in part.

1. *C*ordless *T*elephone system.
2. *P*ersonal *C*ommunication *S*ervices using cordless telephones operating on a 1.9 GH_z frequency band and utilising digital technology as opposed to analogue technology.
3. R.S.C., 1985, c. C-44, as amended.
4. Invoking the first paragraph of article 2157 C.C.Q. which stipulates that:- "*Where a mandatary binds himself, within the limits of his mandate, in the name and on behalf of the mandator, he is not personally liable to the third person with whom he contracts. The mandatary is liable to the third person if he acts in his own name, subject to any rights the third person may have against the mandator.*"
5. Defined as "the discount rate (stated as an annual rate) that equates the Market Value on the Valuation Date to the Funds Invested taking into account the timing of the investment of such funds over the Calculation Period.
6. "Means the earlier of (i) the date of the closing of the initial public offering of Equity Shares of the Corporation and (ii) April 1, 2000"
7. Which was annexed to this letter and indicated a recommendation that each Vice-President be paid a bonus equal to 50% of his or her salary, adjusted to their commencement dates.
8. See article 2094 C.C.Q. which stipulates that:- "*One of the parties may, for a serious reason, unilaterally resiliate the contract of employment without prior notice.*" and the "Commentaire" to this article by the Minister of Justice, *Commentaires du ministre de la Justice*, Les Publications du Québec, 1993 at page 1316 confirms that it:- "*...consacre ici encore une solution jurisprudentielle, la Cour suprême ayant déjà, dans l'arrêt Dupré Quarries Ltd. c. Dupré* [1934] S.C.R. 528 S.C.C. *considéré qu'il n'était pas nécessaire de faire résilier le contrat par les tribunaux avant de congédier le salarié. L'article évite d'énumérer les motifs sérieux de rupture de contrat, de façon à ne pas scléroser la jurisprudence. En ce domaine, doit régner le pouvoir d'appréciation des tribunaux lesquels, d'ailleurs, retiennent essentiellement comme critère, le gravité de l'acte générateur de faute. On notera que l'expression motif sérieux a été retenue par souci de cohérence terminologique et conceptuelle avec d'autres dispositions du Code civil. L'article précise, enfin, que la résiliation pour un motif sérieux exclut la nécessité d'accorder un préavis, même pour les contrats à durée indéterminée.*" (emphasis added).
9. Arguing that, in the words of Mr. Justice Rothman of our Court of Appeal in *Bilodeau c. Bata Industries Ltd.* [1986] R.J.Q. 531 Que. C.A. , at page 533:- "*(t)raditionally, <just cause for dismissal has involved serious grounds such as dishonesty, insubordination, gross negligence or the like, and not mere inability to measure up to the position, particularly where the employee has been in the position for a prolonged period.*"
10. Which in part stipulates:- *241. (1) [Application to court re oppression] A complainant may apply to a court for an order under this section. (2) [Grounds] if on an application under subsection (1), the court is satisfied that in respect of a corporation ... (a) any act or omission of the corporation ... effects a result ... or (c) the powers of the directors of the corporation ... have been exercised in a manner ... that unfairly disregards the interests of any security holder ... or officer, the court may make an order to rectify the matters complained of. (3) [Powers of court] in connection with an application under this section, the court may make any ... order it thinks fit including ... (a) an order restraining the conduct complained of;... (d) an order directing an issue ... of securities; ... (f) an order directing a corporation,... or any*

other person, to purchase securities of a security holder ... (j) an order compensating an aggrieved person; (k) an order directing rectification of the registers or other records of a corporation under section 243; ...

11. See *Sauvé c. Banque Laurentienne du Canada* [1994] R.J.Q. 1679 Que. S.C. , at page 1682 where Mr. Justice Normand affirms that:- "*Il appartient à l'employeur d'établir une cause de congédiement, cette cause devant exister sans distinction ni solution mitoyenne: ou bien il y a une cause ou bien il n'y en a pas.*"

12. Paraphrasing the words of Mr. Justice Toth in *Chisholm c. Bossé, Charbonneau Inc.* May 28, 1984 no C.S. Montréal 500-05-012738-819 Que. S.C. , at page 3 where he adds that:- "*Il n'est pas possible de dresser un inventaire exhaustif des diverses causes de congédiement, celles-ci devant être considérées à la lumière de divers facteurs tels que l'importance du poste occupé, les degrés des fautes commises, la nature de l'emploi...*".

13. Based, it appears, on his rendition of the tune "The times they are a changin" at the Christmas party, December 1994.

14. *Griffin c. Société de Récupération, d'Exploitation et de Développement Forestier du Québec (Rexfor)* May 10, 1993 no C.S. Québec 200-05-000664-917 Que. S.C. .

15. *McMahon c. Caisse Populaire de St-Marc-sur-Richelieu* May 29, 1993 no C.S. Richelieu 765-05-000115-946 Que. S.C. .

16. *Bertrand c. Aliments Ashley-Koffman* April 25, 1994 no C.S. Montréal 500-05-002407-920 Que. S.C. .

17. *Ennis v. Canadian Imperial Bank of Commerce* 1986 13 C.C.E.L. 25 B.C. S.C. ; *Sauvé c. Banque Laurentienne du Canada* [1994] R.J.Q. 1679 Que. S.C.

18. *Fonceca v. McDonnell Douglas Canada Ltd.* 1983 1 C.C.E.L. 51 Ont. H.C. ; *L'Homme c. Termaco Ltée.* April 21, 1995 no C.S. Iberville 755-05-000291-920 Que. S.C. ; *Bazinet c. Radiodiffusion Mutuelle Ltée* , D.T.E. 85T-640.

19. *Ma v. Columbia Trust Co.* 1985 9 C.C.E.L. 300 B.C. S.C. ; *Atkinson v. Boyd, Phillips & Co.* 1979 9 B.C.L.R. 255 B.C. C.A. .

20. *Woolley v. Ash Temple Ltd.* 1991 36 C.C.E.L. 257 B.C. S.C. ; *Green v. Confederation Life Insurance Co.* 1985 10 C.C.E.L. 109 Ont. H.C. .

21. *Adams v. Allcroft* 1907 38 S.C.R. 365 S.C.C. .

22. *Lavoie c. Squibb Canada Inc.* January 29, 1988 no C.A. Montréal 500-09-000082-859 Que. C.A. , at page 4, where our Court of Appeal reminds us that:- "*Il s'agit essentiellement d'une question de fait, de preuve et de crédibilité des témoins.*"

23. Applying to this case the words of Mr. Justice Rothman in *Bilodeau c. Bata* , op. cit., note 9, at page 533.

24. As explained by the authors of *Le Congédiement en Droit Québécois*, Cowansville, 3e éd., à la page 4-2 (no. 4.1.4):- "*En pratique, c'est l'employeur qui a le fardeau de démontrer que l'employé a été congédié pour de tels motifs. C'est un fardeau qui est généralement difficile à renverser, surtout dans les cas où le motif du congédiement repose sur des critères subjectifs. En l'occurrence, l'insatisfaction de l'employeur sur le rendement de son employé n'est pas retenue comme un motif de congédiement pour cause, à moins que l'employeur ne démontre clairement et objectivement l'incompétence flagrante de son employé. De plus, les conflits de personnalités qui sont souvent le véritable motif du congédiement d'un employé ne sont pas retenus comme suffisants pour entraîner un congédiement pour cause, à moins qu'ils nuisent au climat de travail dans l'entreprise à un point tel que le congédiement soit la seule façon de remédier à ce problème. En somme, le congédiement est désormais considéré comme la peine dite capitale, et la jurisprudence se montre plus exigeante devant de telles situations.*" (emphasis added)

25. *Thorneloe c. Commission Scolaire Régonale Eastern Townships* (October 23, 1984), no C.S. St-François 450-05-000765-822 (Que. S.C.).

26. *Stewart v. Standard Broadcasting Corp.* [1994] R.J.Q. 1751 Que. C.A. .
27. *Doudeau c. Standard Radio Inc.* (January 5, 1993), no C.S. Montréal 500-05-010075-917 at pages 9 to 11 inclusive; modified as to quantum on appeal, (June 30, 1994), no C.A. Montréal 500-09-000188-938 [reported 1994 9 C.C.E.L. (2d) 297 Que. C.A.].
28. Who should be reminded of the address made by John Millward, a Bounty mutineer, to his fellow sailors moments before his public execution in 1792:- "*Brother seamen, you see before you three lusty young fellows about to suffer a shameful death for the dreadful crime of mutiny and desertion. Take warning by our example never to desert your officers, and should they behave ill to you, remember it is not their cause, it is the cause of your country you are bound to support*", at page 55 of a special edition of *The Court Martial of the "Bounty" Mutineers*, 1989, edited with an introduction by Owen Rutter, F.R.G.S.
29. Defined in *The New Shorter Oxford English Dictionary*, Oxford, 1993, vol. 2, at page 2231 as:- "*Take and use as one's own(the thoughts, writings, inventions, etc., of another person); copy (literary work, ideas, etc.) improperly or without acknowledgement; pass off the thoughts, work, etc., of (another person) as one's own, E18.2 v.i. Practice or commit plagiarism.*"
30. At page 31.
31. Op. cit., note 24.
32. See the *Bilodeau* case, op. cit. note 9.
33. As in the *Standard Broadcasting* case, op. cit., note 26, at page 1755 where the trial judge observed that:- "*...wherever the truth lay, the professed "deep concern" of the Defendant about this morale problem was never put to the Plaintiff clearly, precisely and so as to convey to him unambiguously that Defendant considered his management style wholly or partly responsible for the morale problem.*"
34. See article 1613 C.C.Q.
35. See paragraphs 123 to 133 of the Défense réamendée dated October 30, 1996.
36. To borrow a phrase from Mr. Justice LeBel, dissenting, in the *Standard Broadcasting* case, op. cit., note 26, at page 1756 where he added:- "*Dans le présent dossier, le congédiement a été effectué dans des circonstances de nature à porter atteinte à la réputation de l'employé et compromettre sa carrière. Il oeuvrait dans un milieu où le nombre de poste comparables au sien était peu nombreux. Le congédiement est survenu de façon complètement inattendue pour l'employé, sans aucun avertissement préalable. Comme l'indique la preuve examinée en première instance, le fait non seulement du remplacement mais du renvoi même de Stewart a été largement diffusé dans le milieu des médias. Un congédiement conduit de cette façon ne pouvait que naturellement laisser des doutes sur les qualités professionnelles et la réputation de celui qui en était victime, comme l'a d'ailleurs conclu la Cour supérieure, après évaluation de la preuve.*" In these circumstances, all very similar to our case, Mr. Justice LeBel would have awarded $10,000. The majority of the Court dismissed this head of damage on the ground there was no abuse by the employer in the exercise of a legitimate right to dismiss an employee coupled with the fact that the trial judge was in a position to consider such damages when fixing the indemnity in lieu of reasonable notice - which he did but under a separate head of damage. In our case, the indemnity is fixed arbitrarily by the Employment Contract.
37. Article 12.1 recited at page 6 above.
38. Which stipulates that:- "*Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null. The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court.*"
39. Recited at page 13 above.

40. As defined in section 238(d) of the Act, op. cit., note 3.
41. See on this issue the cases of *Re Cucci's Restaurant Ltd.*: *Burnett v. Tsang* 1985 29 B.L.R. 196 Alta. Q.B. ; *Mohan v. Philmar Lumber (Markham) Ltd.* 1991 50 C.P.C. (2d) 164 Ont. Gen. Div. , at page 166; *Camroux v. Armstrong* 1990 47 B.L.R. 302 B.C. S.C. , especially at page 308 (obiter) and M[es] Maurice Martel and Paul Martel, *La compagnie au Québec: les aspects juridiques*, Special ed., Montreal, 1995, at page 793 and following.
42. See for example *Welichka v. Bittner Investments Ltd.* 1988 90 A.R. 224 Alta. Q.B. , at 225-226; *Naneff v. Con-Crete Holdings Ltd.* 1994 19 O.R. (3d) 691 Ont. Div. Ct. ; aff'd 1995 23 O.R. (3d) 481 Ont. C.A. ; *Deluce Holdings Inc. v. Air Canada* 1992 98 D.L.R. (4th) 509 (Ont. Gen. Div. [Commercial List]), especially at page 521 and 522; *Tavares v. Deskin Inc.* January 25, 1993 Doc. 92-CU-49758 Ont. Gen. Div. ; *West v. Edson Packaging Machinery Ltd.* 1993 16 O.R. (3d) 24 Ont. Gen. Div. .
43. Paraphrasing Mr. Justice Cavarzan in *West v. Edson Packaging Machinery Ltd.* , op. cit, note 42, at page 29.
44. See the *Deluce Holdings Inc.* case, op. cit., note 42.

2000 CarswellOnt 4554
Ontario Superior Court of Justice [Commercial List]

Working Ventures Canadian Fund Inc. v. Angoss Software Corp.

2000 CarswellOnt 4554, [2000] O.J. No. 4537, 101 A.C.W.S. (3d) 282

Working Ventures Canadian Fund Inc., Applicant and Angoss Software Corporation, Respondent

Cameron J.

Heard: October 10-11, 2000
Judgment: November 27, 2000
Docket: 00-CL-3698

Counsel: *Douglas F. Harrison* and *Adrian C. Lang*, for Applicant.
Andrew M. Robinson, for Respondent.

Subject: Corporate and Commercial; Contracts

APPLICATION by creditor for relief from oppression.

Cameron J.:

Application

1 Working Ventures Canadian Fund Inc. ("Working Ventures") applies under the *Ontario Business Corporations Act* ("OBCA") s. 248 and Rule 14.05 (3) for:

(a) a declaration that the refusal of Angoss Software Corporation ("Angoss") to permit Working Ventures to exercise a warrant for the purchase of 1,200,000 shares of Angoss at a cost of $0.25 per share (the "Warrant") has effected a result that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of Working Ventures;

(b) a declaration that the Warrant is valid and enforceable and that Working Ventures is entitled to exercise the Warrant pursuant to its terms;

(c) an order directing Angoss to issue forthwith 1,200,000 of its shares upon the payment of $300,000.00 by Working Ventures to Angoss;

(d) an order directing that the shareholders' register of Angoss be amended to reflect Working Ventures as the holder of 1,200,000 common shares of Angoss;

(e) in the alternative, an order for specific performance pursuant to the Warrant;

(f) in the alternative to subparagraphs (b), (c), (d) and (e) above, an order directing Angoss to pay damages to Working Ventures in the amount of $8,000,000.00 for 1) oppression or 2) breach of contract; and

(g) an order directing Angoss to pay Working Ventures $12,000.00 due and owing on account of principal on a promissory note dated December 30, 1997.

Parties

2 Angoss is a Canadian software development company incorporated under the OBCA, engaged in the development and sale of advanced data mining software solutions. The common shares of Angoss are listed on the Canadian Venture Exchange, formerly the Alberta Stock Exchange ("ASE").

3 Working Ventures is a Canadian Labour Sponsored Investment Fund. It raises money from shareholders who invest a maximum of $5,000.00 a year for which they receive a tax benefit. Its objective is to make investments in small and medium-sized Canadian growth businesses with the objective of achieving long term capital appreciation for shareholders. In 1998 it had invested $331 million in 123 companies out of total investments of $595 million. According to its web-site, Working Ventures is a "long term investor with an appetite for the kind of risk that is needed to support companies that have the potential to grow quickly."

Facts

4 In July 1997, Angoss retained the Canadian investment banking firm, Griffiths McBurney & Partners ("Griffiths") to explore financing options for the company. One of the parties contacted was Working Ventures.

5 By letter dated July 6, 1997, Working Ventures requested information from Angoss for its due diligence investigation of Angoss as an investment risk.

6 During the period of June through September 1997, representatives of Working Ventures met with representatives of Angoss at various times to conduct due diligence to assess Angoss as an investment. In response to due diligence questionnaires and specific inquiries, Angoss provided Working Ventures, both directly and through Griffiths, with extensive materials and confidential business information, including names and contact information of users of Angoss products at major customers, results of its operations, projections and business strategy documents.

7 When Working Ventures assesses an investment, there are two committees involved. Firstly, there is the Management Investment Committee Challenge ("MICC"), which provides an opportunity to take a first look at a deal, and the people who will ultimately approve the transaction ask questions and express concerns. The Management Investment Committee Approval ("MICA") is the approving authority where the actual decision to proceed with the financing is made.

8 An initial report was prepared in June or early July 1997 by Barry Richards and Rob Wilson of Working Ventures to submit to the MICC.

9 The report analyzed the business of Angoss, and with respect to the capability of management stated the following:

> Lynn Stetham, who stepped down as President and Chairman on June 4, 1996, replaced by John Mangold (CEO) and Joe Martin (Chairman) founded the Company in 1984. Joe Martin is currently associated with the Faculty of Management of the University of Toronto. He has had a long distinguished career in management consulting, most recently as Chairman of the Management Committee of Deloitte Touche Tohmatsu International. John Mangold has extensive management experience in sales, marketing, and research and development in both the data warehousing and data mining industries. Prior to joining ANGOSS as Vice-President, Technology in 1995, he was a Managing Partner of the Consulting Division of AT&T Global Information Solutions and President of Teradata Canada Limited.

10 The report summary contains a recommendation which sets forth the reasons for the recommendations and the outstanding risks.

11 The proposal went before the MICC on July 11, 1997, where various suggestions were made on issues which required follow-up.

12 The investment by Working Ventures did not proceed in the summer of 1997.

13 In October SLM Software Inc. ("SLM") commenced an unsolicited takeover bid for Angoss.

14 In the context of, and as a result of the SLM offer, Griffiths was asked to modify its role to reflect an "in play" advisory engagement. As a result, financing discussions with Working Ventures and others were put on hold and Griffiths was instructed by the board of directors to solicit competing expressions of interest in acquiring Angoss.

Angoss Issues a Note and a Warrant to Working Ventures

15 In or about November, 1997 Angoss approached Working Ventures requesting financial assistance as it was having trouble meeting its payroll and other financial obligations. In a Directors' Circular dated December 22, 1997, the directors of Angoss considered the SLM bid inadequate and noted Angoss' need for short-term capital, which was described as "critical". By that point, the directors of Angoss believed that the takeover bid for the company by SLM would fail.

16 One of the major hurdles to Angoss' refinancing was a lawsuit in which it was involved with Trifox. On December 12, 1997, the Ontario Superior Court of Justice released its decision in the Trifox litigation which was favourable to Angoss. It confirmed, the non-performance by Trifox of its obligations, absolved Angoss of responsibility for liabilities shown on its balance sheet at approximately $4,000,000, and awarded Angoss approximately $4,000,000 in damages together with interest and costs.

17 The judgment had a dramatic effect on the viability of Angoss. Angoss immediately reactivated financing discussions with other parties to determine if there was investment interest in the company in light of both the attempted takeover by SLM and the favourable outcome of the Trifox litigation.

18 The Working Ventures financing proposal was negotiated between December 19, 1997, and December 24, 1997. The final version of the Working Ventures offer to lend was delivered to Angoss at 3:00 p.m. on December 24, 1997, and was open for acceptance until 5:00 p.m. on the same day. Angoss was in critical need of cash to pay current operating obligations, including wages. The Loan Agreement was signed on Christmas Eve, the start of the holiday season. Angoss suggests, and Working Ventures denies, that Working Ventures was pressing to execute the Loan Agreement so it could be "booked" in the 1997 calendar year.

19 On December 24, 1997 Working Ventures and Angoss entered into a letter agreement ("Loan Agreement") which stated in its introduction:

> will outline the general terms and conditions under which [Working Ventures] proposes to extend a promissory note and acquire a debenture with warrants attached in [Angoss].
>
> [Working Ventures] are prepared to extend a promissory note as described under the heading "Promissory Note" below upon satisfaction of the conditions set forth under the heading "Conditions Precedent to Extending Promissory Note".

The Loan Agreement provided under the heading "Promissory Note" that a promissory note to be issued by Angoss (the "Note") was to evidence a loan by Working Ventures to Angoss of $300,000 to provide bridge financing (the "Interim Loan") until Working Ventures "can complete its due diligence". The Note was to be due and payable on the earlier of:

(i) a successful takeover bid of Angoss; or

(ii) August 31, 1998.

Interest on the Note was at the rate of 8% per annum payable quarterly in arrears.

Angoss agreed:

(i) to issue to Working Ventures the Warrant exercisable into 1,200,000 common shares at 25 cents which would expire on the earlier of two years from the date of issue provided that the Note has been repaid, or a successful completion of a takeover bid for all the shares of Angoss;

(ii) to pay "a Stand-by Fee of $50,000 for issuing the Note due and payable on receipt of funds".

20 Following the introductory language quoted above the Loan Agreement continued:

We will immediately commence our due diligence and, assuming that such due diligence is satisfactory, we will be in a position to extend a debenture as described below upon satisfaction of the conditions under the heading "Conditions Precedent to Extending Debenture".

The debenture was to be for $2 million at 8% per annum repayable in 2 years secured by a floating charge on all Angoss' assets. The Note would be extinguished out of the proceeds of the debenture. The debenture was to be accompanied by 8 million warrants exercisable into common shares of Angoss at 25 cents per share ("Debenture Warrants"), in return for which the Warrant would be cancelled.

The "Conditions Precedent to Extending Debenture" included:

1. Satisfaction of Working Ventures with the results of its due diligence pertaining to [Angoss] and approval of the investment by Working Ventures' Investment Committee;

2. Opinion of Counsel to [Angoss]...

3. Negotiation and execution of a mutually satisfactory agreement ... including but not limited to the following provisions:

(i) Restrictions on the issue of shares in [Angoss]..

(ii) Working Ventures representation on [Angoss'] Board of Directors...

. . . . .

4. Confirmation satisfactory to Working Ventures acting reasonably that adequate banking arrangements are in place to support [Angoss] throughout the initial year of its strategic business plan.

. . . . .

11. The receipt of requisite approvals for the issue of the Debenture Warrants.

12. Letter of the ASE listing the shares that are the subject matter of the Debenture Warrants.

21 The Loan Agreement further provided that:

(a) the Debenture Warrants were to expire on the earliest of:

(i) a successful completion of a takeover bid;

(ii) three years from the date of issue; or

(iii) thirty days following notice by Angoss to Working Ventures that the average trading price of the shares over the most recent 20 day period was greater than 50 cents per share and the average trading volume exceeded $30,000 per day;

(b) Angoss would pay a commitment fee of $75,000 together with a breakup fee of $400,000 in the event of a successful takeover bid for Angoss (excluding the takeover bid then being made by SML).

Under "General Matters" the Loan Agreement provided:

Regardless of whether the transaction is completed, [Angoss] shall pay all out of pocket expenses of Working Ventures including, without limitation, travel, accounting, due diligence investigation and other special assistance, legal, registration and filing fees and disbursements not to exceed $50,000.

22 The Warrant contemplated in the Loan Agreement and as issued did not contain an expiry date based on notice of the 20 day average price exceeding 50 cents per share which was contemplated for the Debenture Warrants. This provision allowed Angoss to put a cap on the exercise price of the Debenture Warrants. Such a cap was not possible under the Warrant. There has been no request for rectification.

23 Angoss' issued capital at the material times consisted of 33,882,700 common shares. Their closing price on the ASE on December 24, 1997 was 20 cents.

24 Prior to executing the Loan Agreement there was a discussion between Angoss' representatives and Working Ventures' representatives wherein Angoss took the position that the commitment fee of $50,000 was excessive for the $300,000 Interim Loan. Working Ventures representatives stated that, while viewed in isolation, this was true taking into account the overall financing package, an aggregate commitment fee of $125,000 on a financing of $2,000,000 was a "market" return for an investment of this nature. The $50,000 was said to be compensation for assessing the deal and for risk. According to Angoss, the gist of the conversations was that Angoss was led to believe that the $2,000,000 financing would proceed.

25 After the Loan Agreement was executed, but just prior to the closing of the interim financing evidenced by the Note in late December, the chief financial officer of Angoss, Lon Vining, called Mr. Andrew Abouchar, an investment manager with Working Ventures. Mr. Vining took issue with the Loan Agreement and suggested that the Warrant be convertible and should expire when the Loan was repaid. Mr. Abouchar told him that Working Ventures was not prepared to change the Loan Agreement. Mr. Vining accused Mr. Abouchar of negotiating in bad faith.

26 In Mr. Abouchar's report to Working Ventures' Management Investment Committee, dated December 19, 1997, the reasons that he recommended the transaction were:

1. The combination of the high commitment fee and breakup fee coupled with the likelihood of a potential acquisition of the Company present Working Ventures with the opportunity to earn a substantial return on our investment (3x) in a short period of time.

2. The opportunity, to assess on an exclusive basis, a potentially high quality transaction ... subject to due diligence.

3. Seniority ranking of Working Ventures' guarantee.

He noted as a risk:

In the absence of a buyer, and assuming no interest in an investment (from Working Ventures) post due diligence, Working Ventures will have a $250,000 exposure in Angoss. It is our view that the low exposure amount, the senior debt nature of the investment and the valuations implied by the SLM offer, reduce Working Ventures' exposure.

27 The SLM takeover bid expired on December 29, 1997 without being extended.

28 On December 30, 1997, Working Ventures advanced $250,000 to Angoss pursuant to the Loan Agreement (i.e. $300,000 less $50,000 "Stand-by Fee"). At the same time, Angoss issued the Note and the Warrant to Working Ventures.

Since no due diligence had been conducted (given the immediacy of the request) Working Ventures considered the $300,000.00 investment to be risky, and negotiated its fee accordingly. The due diligence conducted in mid-1997 was not reviewed by Mr. Abouchar prior to executing the Loan Agreement due to Angoss' urgent need for cash and Mr. Abouchar's understanding that there would be adequate time for due diligence before proceeding with further financing.

Working Ventures' Investigations

29 Working Ventures commenced its due diligence process regarding Angoss in January, 1998 in accordance with a detailed checklist. Documents were requested by Working Ventures and several binders of information, including a business plan, were provided to Working Ventures by Angoss. Working Ventures reviewed the information. Representatives of Working Ventures had numerous conversations with Angoss and attended at Angoss' offices to review board minutes.

30 Mr. Abouchar spoke to a number of senior members of Angoss' staff including the then president Mr. Mangold and the chief financial officer, Mr. Vining. He also met with Eric Apps, who was on the board (and who is now the president), and with Andrew Shearer, a former board member. Mr. Abouchar indicated to Mr. Apps that from a funding perspective, Working Ventures was concerned about "taking the for sale sign off the front lawn only to have it go back up again". Mr. Apps indicated to Mr. Abouchar that the financing would fund the company's current plans, that with the SLM offer behind the company and given the satisfactory outcome the board was optimistic about Angoss' prospects. Mr. Apps stated that the current board members believed in the business of investment opportunity and wish to work with Working Ventures to help Angoss achieve its business goals.

31 In conducting its due diligence during January and February 1998, neither Mr. Abouchar nor any other member of Working Ventures:

(a) met with or communicated with the Chairman of the board of directors of Angoss or any other directors except Mr. Mangold and Mr. Apps;

(b) according to Angoss, had any "meaningful contact" with Mr. Mangold, President, Lon Vining, Chief Financial Officer, Ken Ono, Vice-President Technologies, Rick Ernst, Vice-President Sales, or any other officers of Angoss, on either business or technology matters;

(c) contacted any of the hundreds of customers, industry partners or technology consultants, including leading independent data mining consultants and partners such as Tandem, COMPAQ and other major US based companies, that Angoss had identified, and provided telephone information for, as being knowledgeable about its business, products, affairs and prospects, all of whom would have been, and still are, able to attest to the credentials of Angoss, the quality of its products, and its position in its industry;

(d) challenged orally or in writing, the company's business plan, strategy, product development plans or otherwise indicate why its due diligence inquiries had proven to be "unsatisfactory"; or

(e) contacted anyone at Angoss orally or in writing, to indicate any areas of any concern arising from any due diligence that may have been conducted by Working Ventures.

32 In his cross-examination with respect to due diligence, Mr. Abouchar stated:

(a) he was not aware of the due diligence report prepared in mid-1997 by Messrs. Richards and Wilson;

(b) in doing his due diligence in December 1997 and in January and February of 1998, he did not go back and look at the old file;

(c) he acknowledged that one of the substantial risks which the July 1997 due diligence uncovered was the lawsuit, and this risk had been resolved by December 1997;

(d) he was not sure that he looked at the binders which were provided by Angoss in response to Working Venture's request for information in doing its due diligence;

(e) a Mr. Maalouf, who reported to Mr. Abouchar, reviewed the documents but there were no memos or notes from Mr. Maalouf in the file dealing with such review;

(f) through his conversations with Messrs. Mangold, Vining, Apps, Shearer and other management he concluded that the board of Angoss was "dysfunctional" and that the company's management was not capable of executing the business plan;

(g) he stated that his reason for not proceeding with the final debenture came down to three matters:

(i) he was concerned about management; saying he had a telephone conversation with Mr. Mangold "and I found him weak and indecisive and ... that my assessment of him was he was incompetent to lead the charge";

(ii) he was upset about a press release issued by Angoss describing its financing with Working Ventures which he felt did not adequately reflect the conditions of the loan, including satisfaction with the due diligence review but which, on cross examination, Mr. Abouchar could not justify;

(iii) he was upset that on December 29, 1997, prior to the closing, he had words with Lon Vining, the Chief Financial Officer, who suggested he was dealing in bad faith.

33 Mr. Abouchar could not remember how many times he spoke to Mr. Mangold. He had no notes and he made no outside external checks except speaking to Mr. Shearer.

34 The only internal documents produced by Working Ventures relating to the due diligence done in January and February of 1998 were as follows:

(a) Angoss Software due diligence checklist dated Thursday, January 8, 1998;

(b) Angoss Business Plan 1998 with documents attached; and

(c) Extracts of Board Meeting.

There were no internal memos, analysis, notes or other indicia of any analysis by Working Ventures personnel with respect to Angoss or its business. Mr. Abouchar left Working Ventures in 1998 or 1999 and destroyed many of his files at the time.

35 Although Mr. Abouchar spoke with the other Working Ventures representatives charged with conducting the due diligence, no written report was prepared as it was not Working Ventures' practice to produce such a report.

36 By early February 1998, Working Ventures had completed its due diligence of Angoss with respect to the proposed $2,000,000.00 financing. Mr. Abouchar decided that Working Ventures would not proceed with the further financing. Mr. Abouchar advised Angoss by letter dated February 12, 1998 that "due diligence has proven to be unsatisfactory" and that it would not be investing any further in Angoss. Mr. Abouchar ended his letter by enclosing a statement of account of Working Ventures' lawyers for $12,049.23.

37 The decision not to go ahead with the investment was made by Mr. Abouchar alone following discussions with the two employees of Working Ventures who reviewed the documents. He did not go to Mr. Whitaker, his superior, nor did he take the matter to the MICA.

38 The result of Working Ventures not proceeding with the financing was that Angoss was left with an unsecured debt of $300,000 due August 31, 1998 for which it had paid a commitment fee of $50,000 together with interest at 8%

and legal fees of $12,000. Working Ventures claimed it was entitled to keep the Warrant. Without taking into account the Warrant, the effective interest rate for the eight month loan was approximately 35% plus legal fees.

Alleged Conflict of Interest

39 The negotiations between Working Ventures and Angoss were conducted while Angoss was "in play" and the SLM bid was outstanding. Working Ventures did not disclose to Angoss that it had an equity interest in SLM of 2% of SLM's issued shares. Mr. Abouchar knew of the investment by SLM.

40 In a press release on April 7, 1998, Angoss acknowledged that the decision not to proceed with the $2,000,000.00 financing was Working Ventures' decision to make.

Settlement Negotiations

41 On August 25, 1998, less than a week before the maturity date of the Note, Angoss sought from Working Ventures an extension of the maturity date to December 31, 1998. Settlement negotiations ensued. Mr. Apps took the position that the whole basis upon which Angoss had taken the $300,000 loan and given the Warrant was that it was an interim loan which would be repaid and the Warrant would be retired when the full financing and Debenture Warrants were advanced.

42 On or about October 2, 1998 (more than a month after the due date of the Note) Working Ventures and Angoss entered into an agreement to retire the Note and the Warrant (the "Settlement Agreement"). The Settlement Agreement provided:

> (a) Angoss would pay $288,000 together with interest on the promissory note with payment to be made on October 7.
>
> (b) The balance of $12,000 together with any obligations of Angoss for the Warrant, were to be satisfied through the issuance (subject to receiving required regulatory approvals) of $20,000 worth of common shares of Angoss based on the closing trading price of the common shares of Angoss on Friday, October 2, 1998, which was 9.5 cents per share. This would result in the issue of 210,526 common shares.
>
> (c) In consideration of the payment and issuance of the shares, Angoss would have no further or other liability or obligation to Working Ventures on either the Note or the Warrant.
>
> (d) Angoss was to seek the required approvals immediately.

Paragraph 4 of the Settlement Agreement provided:

> (e) [Angoss] shall seek the Required Approvals immediately following acceptance hereof by [Working Ventures]. If the Required Approvals are not obtained, [Working Ventures] and [Angoss] **shall and do hereby reserve their respective positions** with respect to the repayment of additional amounts due under the debenture and the rights and entitlements of [Working Ventures] under the Warrant. [emphasis added]

43 On October 7, 1998 Angoss paid Working Ventures $288,000.00 towards the outstanding balance of the Note and wrote to the ASE for its approval of the issue and listing of the 210,526 shares required to satisfy the warrants in the Settlement Agreement.

44 The ASE stated that it would not accept a settlement value for the Warrant exercisable at 25 cents as it was valueless, based on the stock's closing price of 10 cents on October 2, 1998 and that in any event, no shares could be issued to any person below 10 cents.

45 On or about January 27, 1999 Angoss indicated to Working Ventures that it received approval from the ASE to issue only 128,900 common shares at an issue price of 10 cents per share (a value of $12,890) and that this was all

that Angoss was prepared to issue. The ASE was apparently not prepared to allow the issuance of any shares in respect of the Warrant.

46 On or about February 4, 1999, Angoss advised Working Ventures that if Working Ventures was not willing to accept what the ASE had approved then it would leave the payment open and leave the Warrant in Working Ventures' hands ... "its your call".

47 On or about February 8, 1999 Working Ventures advised Angoss by an undated letter that it was disappointed that Angoss would not honour the settlement and that the Warrant would remain outstanding until the earlier of maturity or when Working Ventures decided to exercise it, and that repayment of the Note did not affect the Warrant.

48 It is Angoss' position that this statement that it would not honour the settlement was untrue. Angoss said it was willing and ready to honour the Settlement Agreement. Angoss said the ASE had agreed to Angoss issuing shares at 10 cents to settle $12,000 for legal fees and $8,000 for the interim warrant.

49 On February 10, Mr. Vining wrote to Mr. Abouchar in response to his undated letter of about February 8. In the letter Mr. Vining stated that the ASE did approve the issue of 200,000 shares at a minimum price of 10 cents per share. This position is said to be based on a telephone conversation by someone other than Mr. Apps with someone in the ASE. There is no written concurrence of the ASE to evidence this approval. In the absence of evidence of the ASE's approval in writing, I refuse to believe that any such ASE approval exists. No reasonable person would rely on an oral approval by a regulatory body in respect of an approval for listing of shares, especially one which is contrary to an earlier approval in writing. I do not accept that the ASE would give such approval by any means except in writing, as it did October 10, 1998 and in January 1999. While this is a matter of credibility, neither party requested a trial of the issue.

50 On February 10, 1999 Angoss' common shares closed at 15 cents.

51 On or about June 4, 1999, Angoss again confirmed Working Ventures' understanding of Angoss' obligations to Working Ventures with respect to the balance of $12,000 remaining on the Note and the outstanding Warrant, which was exercisable at Working Ventures' option. Mr. Apps agreed on cross-examination that if the terms of the Retirement Agreement were not fulfilled, they reserved their respective positions prior to the Retirement Agreement.

Attempted Exercise of the Warrant

52 On its face, the Interim Warrant expired at 5:00 p.m. on December 30, 1999. The Interim Warrant provided that it could be exercised "by the surrender of this Warrant with the attached purchase form duly executed at the principal office of [Angoss] at 34 St. Patrick Street, Suite 200, Toronto..."

53 On Tuesday December 29, 1999, Working Ventures attempted to exercise the Warrant by having its transfer agent, Royal Trust Company, deliver to Angoss' registrar and transfer agent, Montreal Trust Company, a letter addressed to Angoss on St. Patrick Street, enclosing the Warrant, a completed purchase form and a cheque in the amount of $300,000.00 payable to Angoss for the purchase of 1,200,000 shares of Angoss.

54 Angoss shares closed at 72 cents on the previous trading day, December 24, 1999. In the previous 20 trading days closing prices ranged from a low of 55 cents to a high of 78 cents.

55 On Wednesday December 30, 1999, Mr. Apps received a call at 9:45 a.m. from Yasam Farook, of Montreal Trust Company, Angoss' transfer agent and registrar, indicating that Working Ventures was seeking to exercise the Warrant. Mr. Apps told Mr. Farook not to issue common shares on the Warrant.

56 On December 30, 1999, Mr. Apps telephoned James Armstrong at Working Ventures and advised him that the Warrant was the subject of a significant dispute between Working Ventures and Angoss and that the position of Angoss was that the Warrant was void.

57 On January 4, 2000, Montreal Trust Company delivered the purchase form and Working Ventures cheque to Angoss. Angoss returned the cheque and the Warrant to Working Ventures in late January.

58 Working Ventures remains ready, willing and able to tender payment to Angoss of $300,000.00 in order to exercise the Warrant.

59 On January 4, 2000 the closing price of Angoss' shares was 74 cents. The closing price peaked at $7.70 on March 6, 2000.

60 This Application was commenced on March 17, 2000 when the closing price was $4.80 on a volume of 475,030 shares. By April 14, 2000 the closing price had dropped to $1.61.

Issues

61 Is the Warrant in effect?

Angoss argues that the Warrant is not outstanding because:

(a) There was a settlement between the parties;

(b) The Warrant was issued as part of the Loan Agreement which Working Ventures failed to perform in good faith.

Is this an appropriate case for an oppression remedy?

Is this an appropriate case for specific performance?

If specific performance is inappropriate, what is the measure of damages?

Does Working Ventures have a duty to mitigate?

Discussion

Survival of the Loan Agreement

62 The Settlement Agreement was clearly intended to resolve all outstanding issues between the parties arising out of the Loan Agreement by rescinding it, including the amount owing on the Note, the effect of the outstanding Warrant and any obligation of Working Ventures to lend an additional amount and any obligation of Angoss to issue warrants for more shares. However Angoss failed to obtain the approval of the ASE to the issue of the 210,000 shares contemplated in the Settlement Agreement. The intent of the parties on failure of the Settlement Agreement is evidenced by paragraph 4 thereof. Accordingly, the Loan Agreement, the Note and the Warrant remained in effect. See *Morris v. Baron & Co.* (1917), [1918] A.C. 1 (U.K. H.L.). This position was confirmed by Angoss on June 4, 1999. Accordingly, there was, and still is, $12,000 plus some interest owing on the Note.

Adequacy of Notice of Exercise

63 Working Ventures claims Angoss acted in bad faith and oppressively and unfairly in refusing to honour the Warrant when the market price of the shares exceeded the exercise price of the Warrant. Angoss claims that Working Ventures did not comply with the terms for exercise of the Warrant to the extent that:

a) it was only sent to Angoss' office of St. Patrick Street 5 days after the alleged expiry date of December 30, 1999;

b) the notice of exercise was initially sent to Angoss' transfer agent and not directly to Angoss' office on St. Patrick Street.

64 The Warrant was presented for exercise and Angoss received notice from its transfer agent of the exercise prior to 5:00 p.m. on December 30, 1999. Mr. Apps' call to Mr. Armstrong at Working Ventures advising of his refusal to honour the Warrant was, subject to other outstanding issues respecting the effect of the Settlement Agreement, a clear anticipatory breach of the Warrant. It obviated the need to exercise the Warrant before commencing this proceeding. There was still $12,000 owing on the Note when Angoss received at its St. Patrick Street office the documents from Royal Trust on January 4, 2000. Accordingly the Warrant was still exercisable.

65 There was no prejudice whatsoever to Angoss by reason of the failure in strict compliance which the law requires for exercise of the privilege of an option. The terms for exercise were fulfilled in substance. The cheque payable to Angoss and notice of exercise was sent to Angoss' transfer agent, and Angoss received at its office notice of the exercise prior to the alleged time of expiry. Indeed Angoss advised Working Ventures prior to the time for expiry that it would not honour the exercise of the warrant. The exercise documents were sent on to Angoss at its St. Patrick Street office when $12,000 plus some interest was still owing on the Note. The law requires strict compliance with the exercise of an option. See *Pierce v. Empey*, [1939] 4 D.L.R. 672 (S.C.C.) where a condition as to payment was not fulfilled either strictly or in substance and the failure to comply appears to have had a practical consequence. In *Affiliated Realty Corp. v. Sam Berger Restaurant Ltd.* (1973), 2 O.R. (2d) 147 (Ont. H.C.) there was a failure to (a) mail notice of exercise of an option to renew a lease on time and (b) to mail it by prepaid registered mail. The notice was not in fact received within the 24 hours transit time deemed in the lease; indeed it was never received. The landlord became aware of the intended renewal about 11 days later.

66 In this case the non-compliance of indirectly giving notice to Angoss at its transfer agent when the notice was sent, in time, to Angoss was a highly technical breach of no consequence. I find the Warrant was validly presented for exercise.

Oppression Remedy

67 Angoss acknowledges that Working Ventures is a "complainant" within the meaning of s. 245 of the OBCA.

68 Working Ventures claims an alternative avenue of relief by way of the "oppression" remedy under s. 248 of the OBCA.

69 Working Ventures must establish a *prima facie* case of oppression or unfair disregard of its interests on a balance of probabilities. The onus then shifts to Angoss to rebut the presumption. See *Brant Investments Ltd. v. KeepRite Inc.* (1987), 37 B.L.R. 65 (Ont. H.C.), at 95; affirmed *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.), at 312. That issue is a question of fact in each case: *Westfair Foods Ltd. v. Watt* (1991), 79 D.L.R. (4th) 48 (Alta. C.A.) at p. 55. The reasonable expectations of the parties are a relevant consideration in determining the issue of unfairness or oppression: *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), at 490 citing *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.) at p. 185-186.

70 Those reasonable expectations will be found in the relationship between the parties including, in this case, the Loan Agreement and the Note and the Warrant Agreement issued under the Loan Agreement.

71 A complainant who is a creditor and a holder of warrants to purchase common shares has a reasonable expectation that the issuer of the shares will meet its contractual obligations. Those interests are unfairly disregarded when the reasonable expectations are unfairly breached.

Good Faith

72 The reasonable expectation of Working Ventures and the unfairness of the alleged disregard of the interest of Working Ventures must be assessed in the context of Working Ventures' performance of its obligations under the Loan Agreement. Angoss alleges that Working Ventures had an obligation to act in good faith in the exercise of its due diligence and right to decide whether or not to lend to Angoss $1.7 million in addition to the $300,000 interim financing.

73 Angoss argues that Working Ventures only wanted the quick profit for an 8 month loan outlined in the December 19 internal memo and was never really interested in the larger loan for 2 years. Further, Angoss argues that Working Ventures treated the Loan Agreement as an option rather than an obligation to loan the additional amount. It was for this reason that Mr. Abouchar was upset with the Angoss press release of December 29 characterizing the Loan Agreement as an obligation to lend $2 million subject only to due diligence.

74 Angoss has referred to a number of cases imposing on the parties to a contract an obligation to perform their part of the contract in good faith. In *LeMesurier v. Andrus* (1986), 25 D.L.R. (4th) 424 (Ont. C.A.) a purchaser of residential realty repudiated the contract for an immaterial deficiency in the vendor's title, namely an encroachment by the vendor's driveway onto abutting land by 4 to 9 inches for which the vendors obtained a quitclaim deed for part and removed the remaining 12 square feet of encroachment, being 0.16% of the property. The court found the purchaser's refusal to close capricious and arbitrary. The vendor was able to substantially perform the contract and an abatement could have been given for the shortfall.

75 In *Gateway Realty Ltd. v. Arton Holdings Ltd. (No. 3)* (1991), 106 N.S.R. (2d) 180, 288 A.P.R. 180 (N.S. T.D.) the defendant mall owner lured Zellers, an anchor tenant of the plaintiff's mall, to the defendant's competing mall and took an assignment of the 17 years remaining in the Zellers lease in the plaintiff's mall. The defendant mall owner later agreed with the plaintiff to use its best efforts to find a suitable tenant for the vacated space. The court found the defendant mall owner had a duty to carry out its obligation honestly, fairly and in good faith. It could not refuse to negotiate with department stores which would compete with Zellers.

76 *Canadian National Railway v. Inglis Ltd.*, [1992] O.J. No. 1606 (Ont. Gen. Div.) considered the landlord's obligation in a lease clause requiring the rental to be paid on a renewal of a lease of industrial land in "an amount which in the opinion of the lessor is fair and reasonable". The court found, on consideration of this rent review clause, an obligation on CNR to be able to demonstrate that the annual rental was set out on a fair and equitable basis.

77 In *Leung v. Leung* (1990), 75 O.R. (2d) 786 (Ont. Gen. Div.) a vendor of real estate who rejects an unregistrable mortgage back from the purchaser was held to be under a duty of good faith to use all reasonable steps to complete the contract. The vendor could not rely on a "time of the essence clause" where the tendered performance included minor but easily corrected errors.

78 In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.) Iacobucci J. rejected at p.735 a requirement for "good faith" reasons for dismissal by an employer of an employee on the grounds that it would deprive employers of the right to control their workforce. Such an obligation would be overly intrusive and inconsistent with established principles of employment law. In doing so he cited Gonthier, J. in *Farber c. Royal Trust Co.* (1996), [1997] 1 S.C.R. 846 (S.C.C.) allowing resiling from an employment contract unilaterally but where done without cause, reasonable notice is required. However, when discussing reasonable notice in *Wallace* Iacobucci, J. stated at p. 742:

> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

While the majority in *Wallace* might, where bad faith had been found, have added to the length of the period of reasonable notice, the minority would have compensated for it by damages for mental distress.

79 In *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]) a shareholder's agreement in a closely held corporation gave, on a proposed sale of shares, a right of first refusal to the remaining shareholders. Sales to affiliates were excluded from an event triggering the right. A vendor shareholder structured a sale to an arm's length purchaser using an affiliate to avoid triggering the right of first refusal. Blair, J. held that the grantor of a right of first refusal must act reasonably and in good faith in relation to that right and must not

act to nullify it. In doing so he cited *Landymore v. Hardy* (1991), 21 R.P.R. (2d) 174 (N.S. T.D.) which cited *Gardner v. Coutts & Co.* (1967), [1968] 1 W.L.R. 173 (Eng. Ch. Div.).

80 In *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 13 B.L.R. (2d) 310 (Alta. C.A.) Mesa sold its interest in several oil and gas producing properties to Amoco in exchange for a royalty based on production from the properties. The sale agreement permitted Amoco to (a) pool or unitize any portion of the properties and (b) where it was not the operator of a property, to refuse to contribute to the further development of that property. Amoco drilled a successful gas well on one of the royalty properties and pooled it with an adjacent property which was not part of the agreement under a type of pooling agreement which yielded to Mesa only one half of the royalty it would have received had there been no pooling. The trial judge found that Amoco did not act in good faith in that it chose a form of pooling agreement that seriously interfered with the original expectations of the parties under the contract. The Court of Appeal dismissed the appeal on the basis of interpretation of the agreement, but noted that a general obligation in the law expressed in terms of good faith is not an obvious part of the contract law in Canada and England although it is in the United States. There is an interesting note by the editor of the reports, Richard B. Potter, Q.C., approving the Court of Appeal's decision and questioning the requirement of "good faith" in the performance of contracts generally.

81 I have considered the following articles:

1. McCamus, John, "The Duty of Good Faith in Contractual Performance at Common Law", Superior Court of Justice Fall Education Seminar, National Judicial Institute, 2000.

2. McCamus, John, "Precontractual Duties: Common Law Constraints on Bargaining in Bad Faith", *ibid.*

3. Keefe, John, "The Developing Obligations of Good Faith in Commercial Litigation", 1999, Vol. VII, No. 3,358.

4. O'Byrne, Shannon, "Good Faith in Contractual Performance: Recent Developments", [1995] 74 C.B.R. 70 ;

5. Belobaba, Edward P., "Good Faith in Canadian Contract Law", Law Society of Upper Canada, Special Lectures, 1985.

82 Absent a different written agreement, there is no common law obligation to bargain in good faith. Even if there was the obligation it would probably be so vague and imprecise as to be unenforceable.

83 There does not exist in Ontario common law a freestanding general duty overlaying all contracts that they be performed in good faith. There is clearly a duty not to use bad faith in the performance of a contract. Bad faith must be measured against the obligations and rights of the parties and their intentions and reasonable expectations under their express contract. A duty of good faith should only be imposed in those relationships akin to partnership, insurance, or where the terms of the contract clearly provide for it. Bad faith could probably be said to exist where the conduct is, by an objective standard, capricious or arbitrary.

84 There are two elements in the Loan Agreement which might raise an implication of "good faith in performance". The Interim Loan was to be evidenced by the Note for $300,000. The Loan Agreement provided:

Fee:

WV to earn a Stand-by Fee of $50,000 for issuing the promissory note due and payable on receipt of funds.

A stand-by fee is normally a fee payable to ensure that moneys will be available to borrow on agreed terms in the future. However, the name notwithstanding, its stated purpose and its use in the portion of the Loan Agreement headed "Promissory Note" and dealing only with the Note for $300,000 and the Warrant clearly indicated it is a premium or risk payment for the Interim Loan rather than a stand-by fee relating to the availability of the larger amount to be secured by the $2 million debenture. The premium does however raise the effective interest rate for 8 months to August 31, 1998 to about 35% for the term of the Note. Angoss was not forced into borrowing at this rate. It was free to risk

the consequences of not borrowing at this rate. Angoss had spoken to other risk lenders in the marketplace and had the benefit of financial consultants in seeking out the best terms available.

85 In analyzing the contract and the relationship between the parties, in this case it is clear that the contract was negotiated with some care. The Warrant was issued with the first tranche of the contemplated $2 million loan, namely the Interim Loan for $300,000. The Warrant was a freestanding document and could fairly be said to be an affordable "sweetener" to encourage interim financing when the borrower was in critical need of cash. It was in a similar proportion to the Debenture Warrant as the Interim Loan was to $2 million. There was no time for Working Ventures to carry out its normal investigations prior to deciding whether to make the Interim Loan. Any obligation on Working Ventures to make the larger loan was clearly conditional on Working Ventures being satisfied with the results of its due diligence investigations.

86 Working Ventures did obtain three binders of documents and did conduct some investigations. They did talk to a former director, a director, the president and some officers. There were internal discussions between Mr. Abouchar and his staff who had reviewed the documents. Mr. Abouchar formed an opinion of management based on his own conversations and those investigations which was not favourable. In his mind he says he was not prepared to recommend risking more of Working Ventures' capital. There was no obligation on Mr. Abouchar to present the results of his negative opinion to the Working Ventures' Investment Committee or even to his superior.

87 There is nothing in the Loan Agreement to modify the requirement that Working Ventures be "satisfied" with its due diligence. There is no language in the contract imposing an obligation on Working Ventures to use its "best efforts": *Gateway* or to form an "opinion" which is "fair and reasonable": *Inglis*. The relationship was not one of the exercise of an employer's power over a vulnerable employee in what is generally considered a stressful and traumatic event to the employee: *Wallace* . The situation was not one of unilaterally revoking a right which had been granted for valuable consideration to preserve the partnership type of relationship of a closely held corporation: *GATX*. It was not a situation where an innocent party sought to avoid a contract of substantial value to the party based on only a technical breach which could be easily and readily remedied with little or no loss of time or money: *LeMesurier Leung* .

88 There is nothing in the agreement requiring that in determining whether Working Ventures is "satisfied" that it use some objective standard either in making its investigation or in making its decision. In my opinion it was free to use subjective standards consistent with the risk it anticipated or was prepared to accept. The compensations for that risk had been fixed in the Loan Agreement: the amount to be loaned, the rate of interest, the term, the security, and the sweeteners such as the fees and the number of warrants and their exercise rights. In the absence of clear language in the Loan Agreement it would be unfair and unduly limiting to prescribe the standard of the due diligence to be exercised or the standard to which Working Ventures must be concerned with the risk before being allowed to reject the loan. In these circumstances a subjective standard should be allowed to prevail.

89 There can be no question that any standard of assessment of an investment risk must allow for an assessment of management and their ability to develop and implement a business plan and to provide the leadership necessary for the company to succeed in a competitive marketplace. Working Ventures said it made an assessment and acted accordingly. It was purely a business decision. This court should avoid second-guessing such a decision by imposing an obligation of good faith or readily finding the existence of bad faith.

90 There was little incentive to Working Ventures to forego making a reasonable effort in its due diligence investigation. It had plenty of cash to invest. Its out of pocket expenses would be paid, up to $50,000. On increasing the loan by $1.7 million dollars it would receive a further $75,000 by way of a "commitment fee". For what it was worth, Working Ventures would also be entitled to receive warrants to purchase another 6.8 million shares at 25 cents per share. At the time of decision those shares were trading in the range of 15 cents to 20 cents and so were practically valueless. However Working Ventures obviously thought the warrants had sufficient potential value to call for them in the Loan Agreement. Even if SLM's bid had expired, there was a prospect of other potential buyers which was contemplated in the provisions for break-up fees, payable on a successful bid.

Conclusion

91 In the result, I find, on the balance of probabilities, that Angoss' refusal to honour the exercise of the Warrant when received by Angoss at its St. Patrick Street office from Montreal Trust on January 4, 2000 constituted an unfair disregard of the interests of Working Ventures. Under the terms of the Warrant, the reasonable expectations of the parties was that Angoss would honour the due exercise of the Warrant on any day prior to the later of: (a) 5 p.m. on December 30, 1999; and (b) repayment of the Note. Angoss unfairly breached those expectations by refusing to honour the Warrant before its expiry when the market price exceeded the exercise price. Angoss has failed to establish that there was an obligation on Working Ventures to perform its due diligence in good faith. Angoss failed to establish, on the balance of probabilities, that in performing its due diligence Working Ventures acted in bad faith, when measured against the terms of the Loan Agreement and the surrounding circumstances. The court should be reluctant to interfere in a business decision by finding bad faith except in the clearest of circumstances evidencing capricious or arbitrary conduct. There is nothing in the circumstances to suggest that the standard of due diligence to be applied was anything other than that determined by Working Ventures and that the criteria for acceptance of the risk was anything other than in the sole discretion of Working Ventures. Mr. Abouchar may have been wrong in his assessment of management but the decision to lend was for Working Ventures to make, not the court. Working Ventures unfairly suffered a loss of the difference between the market price of the shares and the exercise price of the warrants for those shares.

Remedy

92 In fashioning an appropriate remedy I have been asked to order specific performance rather than damages. Shares in a public listed company are readily available on the stock market and so lack the uniqueness or irreplaceability required for the equitable remedy of specific performance: See *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.), at 429 citing *Asamera Oil Corp v. Seal Oil & General Corp.* [*Baud Corp., N.V. v. Brook*] (1978), [1979] 1 S.C.R. 633 (S.C.C.).

93 However I have found that Working Ventures' claim for relief falls under the OBCA s. 248. A remedy of specific performance is permitted under the OBCA s. 248 (3), including paragraphs (d) and (k). That sub-section gives the court broad discretion to fashion a remedy. In doing so the court is not restricted by the common law respecting remedies. However the court should consider the rationale behind the common law.

94 I have considered the difficulty of valuing warrants, especially if the quantity is substantially larger than normal daily trading volumes. I have also considered the problem of a reasonable period for mitigating damages as discussed by Estey, J. in *Asamera Oil* at pp. 667 to 669 and 673 to 675. The parties acknowledged in argument that specific performance is the appropriate remedy. I received no real argument on the issue of damages.

95 I order that Angross honour the exercise of the Warrant and issue 1,200,000 common shares to Working Ventures on tender to Angoss of the exercise price of $300,000 within 10 days after judgment becomes final.

96 I further order that Angoss pay the balance of the principal and interest owing under the Note in accordance with the terms of the Note, both before and after judgment, until paid.

97 Costs may be spoken to.

Application granted.

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