COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.,*
2016 BCCA 258

Date: 20160615
Docket: CA41993

Between:

1043325 Ontario Ltd.

Appellant
(Petitioner)

And

**CSA Building Sciences Western Ltd.,
Ralph Jeck and Maria Jeck**

Respondents
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated June 30, 2014 (*1043325 Ontario Ltd. v. Jeck*, 2014 BCSC 1197, Vancouver Docket No. S118825) and supplementary reasons dated August 31, 2015 (*1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd*., 2015 BCSC 1545).

Counsel for the Appellant:	R.S. Fleming
Counsel for the Respondents:	M.B. Morgan L.E. Cook
Place and Date of Hearing:	Vancouver, British Columbia May 4, 2016
Place and Date of Judgment:	Vancouver, British Columbia June 15, 2016

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Willcock

Summary:

In a two-member engineering consulting company, majority shareholder (who was also sole director) forged signature of minority shareholder's principal on various corporate resolutions and waivers to withhold financial information and mislead the minority about the success of the company; forged signature and applied engineering stamp on engineering reports without the permission of the principal of the minority shareholder; and paid himself "very high" management fees over several years. No dividends were ever declared. Court below found the withholding of financial information and forgery of signatures on annual resolutions etc., "coupled with" the payment of the management fees constituted oppression under s. 227 of Business Corporations Act, but conduct relating to the engineering reports was statute-barred and did not give rise to a proper oppression claim. Majority shareholder was ordered to buy out the minority shareholder (at a price that did not reflect any "add-back" of the management fees). Minority shareholder appealed, arguing trial judge erred regarding the engineering reports and management fees issues. <u>Held: Appeal allowed in part</u>. Forgery of signatures on engineering reports gave rise to personal claims belonging to the principal of the minority shareholder qua engineer, rather than to his company qua shareholder, and therefore did not fall under s. 227. However, trial court had erred in failing to consider payment of high management fees as part and parcel of the course of oppressive conduct (including the forgery of waivers and resolutions and misleading the minority as to the company's success) that required a remedy. Discussion of derivative vs. oppression claims and the requirement for 'particular' loss or damage where the two overlap. The payments here could also have given rise to a derivative action on behalf of the company, but since the company has only two members, such a proceeding would only have put the fees back in the control of the majority shareholder. Minority shareholder was not seeking a remedy shared with all other shareholders. It was entitled to expect to participate to <u>some</u> extent in the company's profits. The majority shareholder was ordered to pay $249,065 in "excessive" fees to the minority shareholder.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This is a corporate 'oppression' claim brought by 1043325 Ontario Ltd. (which I will refer to as "Skene Co."), one of two shareholders of a private company, the respondent CSA Building Sciences Western Ltd. ("CSA"). CSA is in the business of engineering consulting. Skene Co., the principal of which is Mr. Skene, holds 44% of the issued shares of CSA, and the respondent Mr. Jeck holds the remaining 56%. At all material times he was the sole director of CSA.

[2] The case is a cautionary tale for shareholders of closely-held corporations who proceed without a clear understanding or written agreement that sets out their mutual expectations; and in particular, for minority shareholders who trust the

majority to conduct the affairs of the corporation in a fair and equitable manner. In this case, the vulnerability of Skene Co. as minority shareholder was compounded by the fact that Mr. Skene did not reside in the Province and was for several years apparently indifferent to how CSA's affairs were conducted.

[3] Skene Co.'s petition sought various remedies, but primarily oppression remedies under s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57. It alleged four types of misconduct perpetrated by Mr. Jeck as the majority shareholder and sole director of CSA:

> – misleading Mr. Skene as to CSA's financial condition, failing to provide Skene Co. with information (including financial statements) relating to CSA, and forging the signature of Mr. Skene, on behalf of Skene Co., on various resolutions and waivers required by the Act;
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> – forging Mr. Skene's signature to engineering reports of CSA and applying his stamp thereto, without his permission and contrary to the rules of his professional association;
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> – causing CSA to pay "excessive" management fees to Mr. Jeck;
>
> – certain transactions involving Mr. Jeck or his wife (the respondent Maria Jeck) in breach of the fiduciary duty Mr. Jeck owed to CSA as its sole director.

[4] The trial judge found that only the first group of allegations set forth above could be said to constitute oppression within the meaning of s. 227. He ordered Mr. Jeck to purchase Skene Co.'s shares for their fair value. With respect to the second group of allegations − the forging of Mr. Skene's signature and the affixing of his engineer's seal to CSA engineering documents – he found that the claim was out of time and was personal to Mr. Skene and thus not properly brought by Skene Co. under s. 227. With respect to Mr. Jeck's causing CSA to pay "excessive" management fees to himself, the trial judge found that although the fees were "very high" and Mr. Jeck had "operated the company as if it was his private entity, without regard for the minority shareholder", they were not "in themselves" oppressive.

Skene Co. contends in this court that the trial judge erred in failing to find oppression or unfair prejudice with respect to both these groups of allegations.

[5] The petitioner asserted in its pleading that oppression and derivative actions are not mutually exclusive (citing *Furry Creek Timber Corp. v. Laad Ventures Ltd.* (1992) 75 B.C.L.R. (2d) 246 at 254 (S.C.)). With respect to benefits and profits allegedly appropriated by Mr. Jeck in breach of his fiduciary duty to CSA, Skene Co. sought an order that they be paid to it as damages or disgorged; or in the alternative, sought leave to commence derivative proceedings for their recovery on behalf of the corporation. The trial judge declined to grant such leave; that ruling is not challenged on appeal.

Factual Background

[6] The trial below occupied 16 days and the trial judge wrote long and very detailed reasons. Any summary of them that I might attempt could not do justice to them. I will therefore limit my description of the facts to those matters that are directly relevant to the issues under appeal.

[7] Mr. Skene, a professional engineer, was 83 years old at the time of trial. He now resides in North Carolina but has lived and worked in many locations during his career. In the 1980s, he had founded and operated a company called CSA Building Sciences Ltd. It had offices in four Canadian cities and was engaged in engineering consulting. Mr. Skene met Mr. Jeck in 1988 and employed him to work in the company's Vancouver office. Mr. Jeck was not and is not an engineer, but according to Mr. Skene's affidavit, he had experience as a carpenter and was a diligent worker. He was hired as a technician and received some mentoring from Mr. Skene with respect to compiling engineering reports and proposals.

[8] In early 1993, Mr. Skene incorporated the Vancouver office of the business as CSA Building Sciences Western Ltd. ("CSA") under the then *Company Act*, R.S.B.C. 1979, c. 59. Mr. Skene deposed that he caused 56 of the 100 issued shares of CSA to be allotted to Mr. Jeck in order to "incentivize" him to maximize the profitability of the business. Mr. Skene himself took 44 shares, which were eventually transferred

to his Ontario company, Skene Co., the petitioner herein. CSA's financial statements indicate that the 100 shares were allotted for $1 each.

[9] The two shareholders did not enter into any shareholders' agreement, nor did they discuss arrangements for Mr. Jeck's remuneration in the long term. Mr. Skene, by then living in Ontario, deposed that at the time, he thought a reasonable "wage" for Mr. Jeck would be between $50,000 and $75,000 *per annum*. In his experience, it was unprecedented for a non-engineer to be the head of an engineering firm and Mr. Skene had taken a risk in appointing Mr. Jeck to that role.

[10] Mr. Skene deposed that he visited Vancouver at least once every four months and had ongoing telephone communications with Mr. Jeck about the progress of CSA's projects and business generally. In 1998, an engineer-in-training was hired; he stayed for some years after qualifying. (Para. 22.) At least initially, however, documents that required the signature of a professional engineer were sent to Mr. Skene to sign. How long this arrangement lasted was controversial, but it was common ground that after 2004 at the latest, Mr. Skene had "little if any involvement" in CSA's day-to-day operations. (Para. 27.) At some point in 2004 as well, he changed his status with the Association of Professional Engineers and Geoscientists of British Columbia ("APEG") to non-practising. (Para. 26.)

[11] In May 2006, Michael and Kimberley Kennedy, engineering technologists formerly employed by CSA, complained to the APEG that Mr. Jeck had forged Mr. Skene's signature and applied his professional engineering stamp to engineering reports without consulting Mr. Skene. When confronted, Mr. Jeck told Mr. Skene the complaint was without merit. Mr. Jeck attributed it to "sour grapes" on the part of Mr. Kennedy. Mr. Skene believed Mr. Jeck's denials at the time, failing (as he now acknowledges) to apply the maxim "Trust but verify". He told the APEG through counsel that there was nothing to the Kennedy complaint. In the present proceeding, he deposed that he took the advice of his lawyer that the termination of his registration in B.C. would be a "practical solution which would avoid a protracted enquiry." He was then age 76 and was only minimally involved in the affairs of CSA, which Mr. Jeck had told him was "just muddling along." Apparently, the APEG closed its file after some time, without any finding of wrongdoing on Mr. Skene's part.

[12] Once Mr. Skene became aware of Mr. Jeck's forgeries of certain other documents (discussed below) in 2011, however, he came to realize the Kennedy complaint had been true. Ultimately, the forgery of his signature on engineering documents became one of the elements of this oppression action. At the start of the litigation, Mr. Jeck absolutely denied signing such documents in Mr. Skene's name. ("It simply never happened.") Late in the trial process, he changed his position and admitted he <u>had</u> attached Mr. Skene's signature and stamp, but had done so with Mr. Skene's permission.

[13] After a lengthy consideration of all the evidence (including the opinions of handwriting experts), the trial judge concluded at para. 207 of his reasons that the Kennedy complaint had been "true" and that Mr. Jeck's testimony at trial had been "misleading at best". This would, the judge stated, be a "significant consideration in assessing [his] credibility". (Para. 214.) The judge continued:

> I recognize that there is contradictory evidence on these questions. But weighing the evidence as a whole, and recognizing the burden of proof is on the petitioner, it is my conclusion that the signatures of Mr. Skene were affixed by Mr. Jeck to the engineering reports and to the shareholders' resolutions without Mr. Skene's consent. Although Mr. Skene did acknowledge signing some completion documents in advance, he denied that he gave authority to Mr. Jeck to sign his name and apply his stamp. I did not find Mr. Skene to be seriously shaken on cross-examination or shown on substantive matters to be significantly inconsistent in his evidence.
>
> I also find that Mr. Jeck must have been aware that the cross-examination of an expert and the production of voluminous files for Mr. Skene to review were tactics to make this litigation more difficult for Mr. Skene to advance. I conclude that counsel for the respondents was not aware of the position that Mr. Jeck had signed Mr. Skene's name to the resolutions when he cross-examined the expert witness on that issue. [At paras. 215-6.]

[14] At para. 217, the Court turned to the question of how Mr. Jeck's forgery of Mr. Skene's signature to engineering documents related to Skene Co.'s oppression claim. Skene Co.'s position was that CSA had been unjustly enriched by the use of the forged engineering documents or alternatively, that the "penal rule of equity" should apply such that CSA should be ordered to disgorge any profits realized from the use of the forgeries. The respondents on the other hand argued that the forgery claim was not one of Skene Co. *qua* shareholder but was a personal claim of Mr. Skene. In their submission, an oppression action is not a "proxy" for personal

causes of action. Alternatively, it was said, the forgery claims were statute-barred or had not been brought in a "timely manner" as required by s. 227(4) of the *Business Corporations Act*. As for the applicable limitation period, the respondents submitted:

> The forgeries, if they were that, occurred at the latest by 2004 and Mr. Skene had clear knowledge of the allegation that Mr. Jeck had forged his name by, at the latest, 2006. The forgery claim was made by the petitioner in this proceeding more than six years later when the pleadings were amended in 2012. [At para. 220.]

[15] The trial judge quoted the relevant subsections of s. 6 of the *Limitation Act,* R.S.B.C. 1996, c. 266, which I also reproduce below:

> (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
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> > …
> >
> > (e) in which material facts relating to the cause of action have been wilfully concealed;
> >
> > …
>
> (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> > (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
> >
> > (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
>
> …
>
> (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

[16] The Court accepted the respondents' contention that because of the APEG investigation, Mr. Skene had been aware in 2006 of allegations regarding the forgery of his signature and the misuse of his stamp by Mr. Jeck. Mr. Skene had had access in 2006 to files that would have substantiated misconduct on Mr. Jeck's part, and having had those facts within his knowledge, would have been in a position to regard an action as having a reasonable prospect of success. Since the trial judge found no

"wilful concealment" within the meaning of s. 6(3) of the *Limitation Act* in relation to the engineering documents, no further postponement of the running of time was "triggered". The six-year limitation period referred to at s. 3(5) had begun to run in 2006 and expired by November 2012 when Skene Co. amended its pleadings to allege the forgeries. (Para. 227.) In the judge's words:

> The respondents' point is that for the postponement provision in s. 6(3)(e) to be triggered the petitioner must establish wilful concealment, which has been interpreted to mean knowingly or deliberately keeping the material facts relating to the cause of action from the plaintiff or knowingly preventing the plaintiff from seeking legal redress: *Cimolai v. Hall*, 2005 BCSC 31 at para. 355, aff'd 2007 BCCA 225. That is not made out here by the petitioner in relation to the forgery allegations concerning the engineering documents.
>
> I do not see how Mr. Skene's position that he relied in 2006 upon Mr. Jeck's comment to the effect that the Kennedys' complaint had no merit can postpone the limitation date. Mr. Skene knew that the allegation was Mr. Jeck was the one who forged the signatures and improperly applied the stamps – in those circumstances a reasonable person, taking advice, would not have relied on the word of the alleged forger and would have investigated and found out if the allegations had merit.
>
> As such, I conclude that the allegations of forgery on engineering reports, if they are a proper oppression claim, are out of time. … [At paras. 231-33; emphasis added.]

[17] The Court also found that the claim was a personal one of Mr. Skene as a professional engineer and not a claim of Skene Co., and thus was not a proper oppression claim. Even if it had been properly brought under s. 227, moreover, it had not been brought in a timely manner as required by s. 227(4). (At para. 233.)

Suppression of Financial Information

[18] The second primary focus of Skene Co.'s oppression action related to what may be described as Mr. Jeck's keeping Mr. Skene in the dark concerning CSA's financial condition. This was accomplished by falsifying Mr. Skene's signature to various waivers and resolutions that required Skene Co.'s assent between 2002 and 2006 and failing to send copies of CSA's (unaudited) financial statements to Skene Co. annually until 2010. Since the trial judge's findings on this topic are not the subject of this appeal, I need describe them only briefly.

[19] At the outset, the trial judge stated:

> I will return to this issue but I find that Mr. Skene did not authorize Mr. Jeck to affix his signature to the resolutions. I also find that Mr. Jeck was not entitled to rely on the fact that audits or meetings had been waived in earlier years by the petitioner as a basis to conclude that they would be waived in the future.
>
> I think it is objectively a reasonable expectation among shareholders, absent other evidence, that statutory corporate requirements, particularly those dealing with the financial affairs of the company, would be complied with. [At paras. 103-4; emphasis added.]

[20] He noted the requirement in s. 203 of the *Business Corporations Act* that financial statements be audited unless all the shareholders of a corporation vote otherwise, and the requirement in s. 198 that financial statements be published unless all shareholders waive their production and publication under s. 200. These were, the judge observed, important provisions for the protection of minority shareholders. Mr. Jeck's conduct in forging Mr. Skene's signature supported the inference that Mr. Jeck had viewed CSA's business as "essentially his and one in which Mr. Skene had no particular interest that had to be respected". In the judge's analysis:

> … I find on all of the evidence that the petitioner thought the company was just "muddling along", because he was told that by Mr. Jeck. Although the company was doing quite well through the period up to 2010 there is no evidence that indicates that relevant financial information was in fact provided to the petitioner. I accept that starting around 2002, CSA Western stopped providing financial statements or any financial information to the petitioner and indicated to the petitioner that the company was "muddling along", suggesting a poorer performance than the company actually had. I have reached that conclusion on a consideration of all of the evidence including an assessment of the credibility of the principals. I have taken into consideration the fact that Mr. Skene allowed the Ontario numbered company's registration lapse; I do not think that really shows a lack of interest in the company or its affairs, but an understanding or a belief that the company was only performing at a very modest level, and that the cost of reinstating the Ontario numbered company might not be worth it. Whether that decision was right or not, I find that, had Mr. Skene known of the true financial performance of the company, it is unlikely he would have let the registration of the petitioner lapse.
>
> I find that the respondents have failed to comply with the statutory requirements of providing audited financial statements in the absence of a waiver, that no waiver was made between 2002-2006, and that none was requested subsequently. I find there were no financial statements provided to the petitioner from 2002-2010. I will consider the other allegations in the petition before deciding the significance of this conclusion to the relief that the petitioner is seeking. [At paras. 112-3; emphasis added.]

[21] Of course, in addition to keeping Mr. Skene uninformed as to CSA's financial position, Mr. Jeck had actively misled him as well. He told Mr. Skene that CSA was "muddling along" and only able to "keep its head above water" (para. 39) − misrepresentations that lulled Mr. Skene into permitting Skene Co.'s corporate registration to lapse in 2006. In fact, CSA was doing well, as described by the trial judge at para. 40.

[22] In early 2010, Mr. Jeck wrote to Mr. Skene, offering to buy Skene Co.'s shares for $10,000 less the cost of reinstating Skene Co. It was then that Mr. Skene finally asked for and received financial statements for CSA from 2003 onwards. Skene Co. commenced this action in 2011.

[23] The judge found that no limitation problem arose with respect to the forging of the consent resolutions waiving the audit requirements without Mr. Skene's authorization: these were "continuing breaches", they were "not statute-barred, were subject to wilful concealment, and in the circumstances were brought in a timely manner." (Para. 226.)

[24] Near the end of his reasons, he considered whether such conduct constituted oppression or unfair prejudice for purposes of s. 227. He rejected Mr. Jeck's argument that the fact Skene Co. had been dissolved between 2006 and late 2011 had prejudiced or affected the respondents. (At para. 270.) Indeed, he found that Skene Co.'s registration had been allowed to lapse because Mr. Jeck had led Mr. Skene to believe there was little point in reinstating it, given the "modest financial performance" he believed CSA was generating.

[25] In summary, the trial judge found that the respondents' conduct in failing to comply with "important corporate governance provisions" and forging Mr. Skene's signature on annual consent resolutions and waivers was conduct that "lacked probity and fair dealing". In all the circumstances, Mr. Jeck was found to have operated CSA "<u>as if it was his private entity, without regard for the minority shareholder</u>" (para. 275; my emphasis) and to have acted in a manner unfairly prejudicial to Skene Co.

Payment of Management Fees

[26] The third major type of conduct complained of by Skene Co. in its petition under s. 227 was CSA's payment to Mr. Jeck of what the trial judge characterized as "very high" management fees. There was a factual dispute as to exactly how much had been paid out in management fees, which the trial judge dealt with at paras. 131-150, concluding that between 2004 and 2011, Mr. Jeck had received income averaging $326,156 and in the years between 2007 and 2011 before the petition was issued, income averaging $413,212. In the years 2010 and 2011, Mr. Jeck had received $634,262 and $511,156 respectively. (Para. 150.) (Evidently, a total of some $517,000 paid to Maria Jeck "for income splitting purposes" was included in these figures: para. 149.) No dividends whatsoever were paid by CSA to shareholders between 2004 and 2011.

[27] As noted earlier, Mr. Skene deposed that he had expected Mr. Jeck to "pay himself an appropriate wage" of $50,000 to $75,000 per year and that he, Mr. Skene, would not have objected to a "comfortable" management wage approaching $100,000 had CSA been doing well. The parties adduced expert evidence on the question of what remuneration would have been reasonable in the engineering consulting context. Having considered this evidence the Court found that:

> …Mr. Jeck has been very well rewarded for his efforts by the compensation he has received. The figures for 2010 and 2011 are high, even by Mr. Cook's analysis. However, I am drawn to the conclusion that <u>while the remuneration Mr. Jeck awarded himself was quite high, given that he has a majority equity interest and as majority owner is able to benefit from his shareholding if the company does well</u>, the remuneration he has received overall was <u>not shown to be so high that, in and of itself, it was oppressive or unfairly prejudicial</u>. [At para. 153; emphasis added.]

[28] Nevertheless, the judge said he wished to consider at a later point whether the management fees were a factor that could be taken into account when he turned to consider whether oppressive or unfairly prejudicial conduct had been shown. On this point, he cited various texts and cases for the proposition that oppression is to be assessed "in combination and context, rather than in isolation" and that it depends on the consideration of all the evidence rather than on isolated incidents. (Para. 156.)

[29] Near the end of his reasons, the trial judge summarized his findings concerning the shareholders' expectations and Mr. Jeck's conduct thus:

> The authorities indicate that the oppression cases are quite fact specific. Here, in these particular circumstances, <u>I have concluded that the majority shareholder essentially operated the company as if it was his private entity, without regard for the minority shareholder</u>. While I do not suggest that Mr. Jeck did not work hard, as he apparently did, I have found that the remuneration he directed to be paid to himself for his efforts <u>is another important aspect of the context of this case</u>. Mr. Jeck was the majority shareholder but he was not the only shareholder. I have found that Mr. Jeck's conduct in relation to the provision of financial information to Mr. Skene and the forging of the impugned shareholders' resolutions, taken with the substantial management fees he received, particularly in 2010 and 2011, <u>supports the position that he was treating this company as if it was his alone</u>.
>
> Notwithstanding that the petitioner was told the company was muddling along, under Mr. Jeck's stewardship the company was doing very well. I have concluded the reasonable expectations of the shareholders as to Mr. Jeck's remuneration had to account for Mr. Jeck's position and role at CSA Western. It is important to recognize that Mr. Jeck was a sole manager; CSA Western would not necessarily pay a dividend which was at the discretion of the director in any event; Mr. Jeck would set his management fees as permitted by the articles; and Mr. Skene had no reasonable expectation to participate in management. All of that I think is true – however, <u>Mr. Jeck's determination of his management fee had to be tempered by the fact that he would ultimately share in any profits as a majority shareholder and that Mr. Skene was entitled to full disclosure of financial information about the company</u>.
>
> Although I did not find the management fees taken by the majority shareholder were in themselves oppressive as excessive in comparison to some norm, I have found that the payments made to Mr. Jeck were high – particularly, very high in the years 2010 and 2011, which were the fiscal years just before the petition was launched.
>
> Overall, I have found that the failure to fulfil the requirement to provide audited financial statements or hold annual meetings, the misleading information about the company's performance <u>coupled with the payment to Mr. Jeck of management fees that were high, and in the years 2010 and 2011 very high, were cumulatively contrary to the reasonable expectation of both shareholders. They demonstrate the operation of the company's affairs in a manner that was oppressive and unfairly prejudicial to the minority</u>. While the minority did not have a unfettered right to dividends or the right to set the manager's remuneration – that was Mr. Jeck's as the sole director – the <u>petitioner was entitled to accurate financial information</u> and at any meeting [to] try to protect its proprietary interest. [At paras. 275-8; emphasis added.]

Fiduciary Claims

[30] Finally, Skene Co. alleged at trial various breaches of fiduciary duty by Mr. Jeck, or Mr. and Mrs. Jeck together, which were described at paras. 234-250 of the main reasons. These breaches involved the appropriation of opportunities

properly belonging to CSA, and Mr. Jeck's failure to disclose his position of conflict of interest. These were advanced as particulars of oppressive conduct, although Skene Co. also sought leave to bring the claims on behalf of CSA as derivative proceedings if the Court was of the view they were not properly the subject of an oppression claim. (Para. 236.) Counsel for Mr. Jeck and CSA contended in response that leave should not be granted for the initiation of a derivative action for a number of reasons, including "absence of merit" and the fact the claims were out of time.

[31] The trial judge considered the nature of oppression proceedings and derivative proceedings and their overlap, as discussed by this court in *Pasnak v. Chura* 2004 BCCA 221. He summarized the substantive requirements for the granting of leave to sue derivatively, as explained in *Luft v. Ball* 2013 BCSC 574. He then addressed each allegation of conflict of interest in turn, ruling with respect to the Jecks' purchase of CSA's business premises that it did not give rise to an oppression claim. It may have been a derivative action but the judge declined to grant leave to Skene Co. to sue in the name of CSA because the claim was "bound to fail because of the limitations issue." (Para. 250.) With respect to Mr. Jeck's causing CSA to guarantee his wife's bank loan, the judge found that since no loss had been suffered by CSA as a result, leave to commence a derivative action on that basis should also be denied.

[32] With respect to Mr. Skene's allegation that Mr. Jeck had wrongfully appropriated to himself and his wife an opportunity belonging to CSA to operate CS Analytics as a separate business in 2012, the judge was again not satisfied that it was properly the subject of an oppression action. He acknowledged that it might form the basis of a derivative action, but left that question for later discussion. Finally, various "trust claims to properties" owned by the Jecks were dismissed given that monies had not been removed from CSA without authority for this purpose. (Para. 259.)

[33] In the result, the order of the trial judge dated June 30, 2014 gave the parties leave to make further submissions "on whether leave should be granted to the Petitioner to pursue this claim as a derivative action" concerning the CS Analytics matter, and dismissed the other claims based on Mr. Jeck's conflict of interest.

[34] On its appeal, Skene Co. does not challenge the foregoing conclusions relating to the “fiduciary” claims.

Remedy

[35] The trial judge turned finally to consider the appropriate remedy for the oppression he had found. He rejected the respondents’ argument that since they had now provided financial statements and, in 2012, audited statements, any deficiencies had been cured. He found that the minority shareholder could not retain any confidence in the “impartiality and fairness of the majority” in administering CSA’s affairs, and that given what had happened in the past, Skene Co. could reasonably expect its mistreatment by Mr. Jeck would continue in future. After describing Mr. Jeck’s motive – <u>to buy Skene Co.’s shares of CSA for a modest amount</u> – and Mr. Jeck’s conduct during the litigation, the Court concluded the appropriate remedy was to order the respondents to purchase Skene Co.’s shares. Counsel were asked for further submissions on the appropriate terms of the buyout and the possible joint retention of an evaluator. The judge then adverted again to the topic of management fees:

> For the reasons that I have given, in fixing the valuation date, I decline to make the requested orders that Mr. Jeck repay management fees over $175,000 per year, or that the business premises be conveyed at the 1997 price, or that Mr. Jeck repay rent that was received. [At para. 289.]

[36] In due course, counsel filed submissions in June 2015 and the Court issued supplemental reasons on July 6, 2015, indexed as 2015 BCSC 1160. The parties had jointly retained a firm of valuators to assess the value of CSA as of December 22, 2011 (the date of filing of the petition) and April 30, 2013 (the date of the most recent audited financial statements of CSA). The valuator found that the *en bloc* fair market value of the shares of CSA was between $1,120,000 and $1,190,000 as at December 22, 2011. The value of Skene Co.’s 44% shareholding before any minority discount was said to range between $493,000 and $524,000. As at April 30, 2013, the value of the 44% share interest was said to lie between $266,000 and $290,000.

[37] Perhaps not surprisingly, Skene Co. argued that the valuation date should be determined as at the date of the petition; that there was no basis for a minority

discount; and that the order should be made jointly and severally against Mr. Jeck and CSA or failing that, against Mr. Jeck, "who has benefited from the oppressive conduct." Also unsurprisingly, the respondents disagreed on all these points and in particular sought a 20% discount since in their submission, Skene Co. had never had a reasonable expectation of receiving a price for its minority shares without such a discount. (Para. 11.) Mr. Jeck also said he did not have sufficient liquidity to satisfy the purchase price and that CSA should be required to redeem Skene Co.'s shares by paying $10,000 per month, for a total of $232,000.

[38] The trial judge observed that the first question to be addressed was whether he should "take into consideration and make adjustments" for the management fees and other amounts charged to CSA under Mr. Jeck's direction. Mr. Fleming on behalf of Skene Co. argued that if Mr. Jeck was not going to be ordered to repay the "excessive" management fees (which in Skene Co.'s submission consisted of all amounts in excess of $175,000 per year), the Court should "add back" the excess amounts to CSA's assets prior to the mandatory purchase by the respondents. The trial judge declined to make such an order:

> ... Although the argument has some attraction, I have on reflection decided not to give effect to it. <u>I had taken into account that there were high, and in some years very high, fees paid to Mr. Jeck, and that formed part of my determination that there was oppression in all the circumstances and my conclusion that there should be a buyout</u>. Moreover, I was asked specifically to order that the buyout be on the basis as that the fees of Mr. Jeck were set at a market rate of no more than $175,000 per year and the excess management fees over the period from 2004 to 2012 be repaid. In my reasons I declined to make an order that Mr. Jeck repay management fees over $175,000. Although Mr. Fleming asserts that the issue before me is somewhat different – the fair price of the shares – and that the factual basis is different – now including the information in the valuator's report – <u>I do not think that it is appropriate to revisit a question I essentially decided in finding oppression and in crafting the remedy of a buyout.</u> Accordingly, I decline to make the adjustments that Mr. Fleming seeks. [At para. 22; emphasis added.]

[39] The Court went on to find that the shares should be valued as at the date of the petition; that no minority discount should be imposed; and that the shares should be purchased at the mid-point of the evaluator's estimated range without any further adjustment – i.e., for the sum of $508,000. He ordered that Mr. Jeck as the majority shareholder must carry out the purchase.

On Appeal

[40] In this court, Skene Co. asserts the following errors on the part of the trial judge:

> 1. The chambers judge failed to consider whether the respondents are estopped from relying on the *Limitation Act* or other delay in relation to the appellant's claims arising from the forgery of Chris Skene's signature on engineering reports, and as such erred in law.
>
> 2. The chambers judge failed to consider the provisions of the *Business Corporations Act* which provide jurisdiction to grant relief to non-parties, the public interest in preventing a party from benefiting from his own fraud, and the public interest in the finality of disputes, and as such erred in law by failing to grant relief arising from the forgery of Chris Skene's signature on engineering reports.
>
> 3. The chambers judge erred in law by failing to find that it was Ralph Jeck's burden, as a fiduciary to CSA Western, to prove that the management fees paid to himself and his spouse were authorized and justified.
>
> 4. The chambers judged erred in law by conflating the issue of what fees Ralph Jeck may be paid for running CSA Western, with the issue of what compensation that he was entitled to as an owner of CSA Western.

Chambers Ruling

[41] For the sake of completeness, I also note that in a notice of motion brought before a justice in chambers in this court in November 2015, Skene Co. sought *inter alia* leave to amend its notice of appeal, appeal record, factum and appeal book, mainly for the purpose of adding a new ground of appeal – that the chambers judge had also erred in denying Skene Co.'s prayer that the shares be valued on the basis that that the "excessive" management fees should be assumed to have been repaid to CSA. The justice in chambers declined to grant that order, reasoning that:

> In my view, while the order of July 6 may be of some value to the parties in showing how the June 30, 2014 order is to be interpreted, it does not represent a re-opening of the issue of damages for the management fees, and it is not an order on which the appellant stands any chance of success upon an appeal. The judge rejected the argument on the basis that it was something that he had already decided. That is, on the face of it, an unassailable proposition. For that reason I am not prepared to accede to the application to amend the notice of appeal or to file additional materials. [At para. 16.]

[42] When counsel for Skene Co. sought to pursue the matter at the hearing of the appeal, Mr. Morgan objected. We ruled that the order of the justice, not having been appealed or reviewed, was clear and that Skene Co. was not permitted to advance a

new ground of appeal to the effect that the value of Skene Co.'s shares should be assessed as if the "excessive" fees had not been paid.

Forgery of Engineering Documents

(a) Limitation Act

[43] Skene Co.'s first argument on appeal is that the court below erred in failing to find that estoppel applied to postpone the running of time for *Limitation Act* purposes after 2006, when the judge found the conditions in s. 6(4) of that Act were met and that Mr. Skene should have been aware of his potential cause of action concerning the engineering documents. This argument raises some difficult factual and legal questions that I am reluctant to embark upon in this case. For one thing, there was some confusion among counsel as to what type of estoppel was being asserted – promissory estoppel or something else (presumably, estoppel by representation or perhaps estoppel by convention). More importantly, the doctrine was not fully argued and the trial judge did not make the necessary findings of fact (and indeed did not address estoppel at all in connection with the engineering documents). He proceeded on the basis of what the respondents say is the correct principle – that whether a defendant can mislead a plaintiff about the veracity of a complaint and then rely on a limitation defence is governed only by s. 6(3)(e) of the *Limitation Act*.

[44] In the circumstances, I again leave for another day the question I stated some years ago in *Chan v. Lee (Estate)* 2004 BCCA 644 at para. 29 – whether estoppel may be applied to extend or postpone a limitation period contained in the *Limitation Act*, or whether its detailed postponement provisions constitute a complete code.

(b) Characterization of the Claim

[45] I move to the question of whether the trial judge erred in finding that the complaint regarding the misuse of Mr. Skene's signature and stamp was not properly the subject of an oppression claim by Skene Co. but was a claim personal to Mr. Skene. I take this to be an argument not concerned with 'standing' in the procedural sense, since the court might well consider the principal of a corporate shareholder to be an "appropriate person" under s. 227(1). Rather, I understand the

respondents' position to be that even if such a ruling had been obtained, the claim would not be properly the subject of an oppression action.

[46] I begin by setting out the material portions of s. 227 of the *Business Corporations Act*:

> 227 (1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.
>
> (2) A shareholder may apply to the court for an order under this section on the ground
>
> (a) that the <u>affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders</u>, including the applicant, or
>
> (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.
>
> (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order
>
> (a) directing or prohibiting any act,
>
> (b) regulating the conduct of the company's affairs,
>
> (c) appointing a receiver or receiver manager,
>
> (d) directing an issue or conversion or exchange of shares,
>
> (e) appointing directors in place of or in addition to all or any of the directors then in office,
>
> (f) removing any director,
>
> (g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,
>
> (h) directing a shareholder to purchase some or all of the shares of any other shareholder,
>
> (i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,
>
> (j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,

> > (k) varying or setting aside a resolution,
> >
> > (l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,
> >
> > (m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,
> >
> > (n) directing correction of the registers or other records of the company,
> >
> > (o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,
> >
> > (p) directing that an investigation be made under Division 3 of this Part,
> >
> > (q) requiring the trial of any issue, or
> >
> > (r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.
>
> (4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.
>
> [Emphasis added.]

[47] As is well-known, the remedy for "oppression" (a term now generally used to include both "oppressive" and "unfairly prejudicial" conduct) was an invention of the *Companies Act*, *1948*, 11 & 12 Geo. VI, c. 38. It represented a response to the fact that at common law, minority shareholders had little protection from corporate conduct or conduct by corporate majorities that unfairly affected the interests of the minority. (See generally *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Rogers v. Bank of Montreal* (1986) 9 B.C.L.R. (2d) 190 (C.A.); *Robak Industries Ltd. v. Gardner* 2007 BCCA 61.) As was recently observed in *Rea v. Wildeboer* 2015 ONCA 373, this "handicap" was the result of two well-entrenched principles of corporate law – the notion of corporate personality and the 'indoor management rule', both of which can be traced back to *Foss v. Harbottle* (1843) 67 E.R. 189 (Ch.). Blair J.A. for the Court in *Rea* described the derivative and oppression actions as follows:

> The derivative action was designed to counteract the impact of *Foss v. Harbottle* by providing a "complainant" – broadly defined to include more than minority shareholders – with the right to apply to the court for leave to bring an action "in the name of or on behalf of a corporation ... for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate": *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 246 ("OBCA"). It is an action for "corporate" relief, in the sense that the goal is to recover for wrongs done to the company itself. As Professor Welling has colourfully put it in his text, *Corporate Law in Canada: The Governing Principles*, 3rd ed. (Mudgeeraba: Scribblers Publishing, 2006), at p. 509, "[a] statutory representative action is the minority shareholder's sword to the majority's twin shields of corporate personality and majority rule."
>
> The oppression remedy, on the other hand, is designed to counteract the impact of *Foss v. Harbottle* by providing a "complainant" – the same definition – with the right to apply to the court, without obtaining leave, in order <u>to recover for wrongs done to the individual complainant by the company or as a result of the affairs of the company being conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the complainant</u>. The oppression remedy is a personal claim: …
> [At paras. 18-19. Emphasis added.]

[48] As observed in *Rea*, the oppression action is clearly a "personal" one, as opposed to a representative or derivative one. The "intersection" or overlap between derivative and oppression actions is a topic much discussed in the cases; but at issue here is the more obscure question of the <u>limits</u> on personal complaints that may be pursued under s. 227. Is any shareholder who has a complaint against a company for <u>any</u> wrong, entitled to invoke s. 227? The answer lies in a consideration of the kinds of rights and expectations protected by, and types of conduct that may be challenged under, the oppression provision.

[49] First of all, s. 227 contemplates that the conduct complained of relates to the way in which the "affairs of the company" are being or have been conducted or the directors' powers have been exercised, or to the passage or proposed passage of a resolution. As Markus Koehnen notes in *Oppression and Related Remedies* (2004), the corporate legislation of many of the provinces (although not of British Columbia) defines "business or affairs of the corporation" for purposes of the oppression provision to mean the relationships among a corporation and its shareholders, directors and officers, etc., but not to include the business carried on by the corporation. (At 110.)

[50] Although each oppression case is fact-specific, certain types of conduct have commonly been found to constitute oppression. Kevin P. McGuinness in *Canadian Business Corporations Law* (2nd ed., 2007) offers this overview:

> Conduct that is found to be unfairly prejudicial or oppressive in one case may not necessarily be found in another, even though the factual setting of the two cases is only slightly different. Still, it is worthwhile to summarize some of the decided case law that is indicative of the range of circumstances in which relief may be available. The appropriation of a corporate opportunity can amount to oppression or unfairly prejudicial conduct. <u>It is oppressive for a controlling shareholder to treat the corporation as if it were wholly owned, as, for instance, by causing it to pay repeated and large personal expenses</u>. It is also oppressive for a controlling shareholder or director to orchestrate the business or affairs of a corporation (e.g., by making discretionary or unjustified payments) to frustrate or circumvent his or her obligations under a contract relating to the securities of a corporation. Violations of the *Securities Act* that do not give rise to a civil cause of action under that Act may also be held to constitute oppression to allow relief to be granted under section 248 [of the Ontario *Business Corporations Act*]. Defensive tactics employed to defeat a hostile takeover bid may also be oppressive. Nominee directors may be guilty of oppression where they are caused or required by the shareholder who nominates them to make its interest paramount and to disregard or downplay the interests of other shareholders.
>
> The classic case of oppression arises <u>where the complainant has effectively been denied the very benefit he or she sought to obtain when joining the corporation</u> in the capacity of a director, officer, or shareholder or when investing in it as a security holder. … [At §13.27-8; emphasis added.]

The author also suggests at §13.92 that:

> … the [oppression] remedy is available <u>where a dispute relates to conduct by the corporation and its officers</u>. It is not available where the dispute is between two shareholders as such, and not the corporation – the dispute must relate to the conduct of the corporation in itself. Nor is relief available merely because of some dispute between two shareholders outside the corporate context – for instance, in the case of the breakdown of a marriage. [Emphasis added.]

[51] Koehnen, *supra*, describes some of the outer limits of the remedy:

> To some degree the conduct in question must and should relate to a corporation. Defining the degree to which oppression should require corporate conduct can be tricky. At the easy end of the spectrum are disputes involving a defendant who exercises no corporate role at all. For example, in *Thomson v. Quality Mechanical Service Inc.,* [(2001) 56 O.R. (3d) 234 (S.C.J.)] the plaintiff was one of two 50% shareholders. The corporation's banking resolution required the signature of both shareholders on cheques. In breach of this resolution, the bank honoured cheques bearing the signature of only one shareholder. The plaintiff's action against the bank for oppression was dismissed on a preliminary motion. <u>While the bank's conduct might</u>

> amount to a breach of its contract with the corporation, the shareholder had no oppression claim because the bank's conduct did not fall within paragraphs (8)(2)(c) of s. 241(2) [of the *Canada Business Corporations Act*]. Similarly, the oppression remedy does not include purely personal disputes between shareholders. Thus, in *Jarmon v. Brown & Gulfstream Cruises Ltd.,* the court found no oppression where the two shareholders were spouses in the midst of a marriage break-up and one spouse sought to wind-up the corporation as a means of effecting division of property. Finally, the oppression remedy does not include the conduct of a defendant who happens to play a corporate role but whose conduct does not involve his corporate role. Thus, where a shareholder was also a mortgagee to the corporation, the shareholder's conduct in foreclosing on a mortgage did not fall within the oppression remedy. The results in these cases, it is submitted, makes sense. The relationships at issue were not properly governed by corporate law but were governed by legal rules applying to banking, divorce or mortgages.
>
> . . .
>
> Some courts have used the requirement for corporate activity to draw a distinction between the "personal" and "corporate" conduct of directors. Actions attributable to officers or directors that are not attributable to the corporation do not amount to oppression …
>
> The requirement for corporate conduct has also lead courts to exclude disputes about shareholder agreements from the ambit of the oppression remedy because such agreements are private contracts that fall outside the affairs of the Company. [Citing *Johnston v. West Fraser Timber Co*. (1982) 37 B.C.L.R 360 (C.A.) *lve. to app* dismissed (1982) 45 N.R. 538n.] [At 106-8; emphasis added.]

[52] The author suggests that requiring "corporate conduct" – i.e., conduct of directors or officers acting in their "corporate capacity" – as a prerequisite to an oppression remedy reflects too narrow a view. He emphasizes that the purpose of the remedy is to "prevent unfairness", which can come in many forms. He suggests the focus should not be on the conduct but on its effect on the complainant. In the leading Canadian case, *BCE Inc. v. 1976 Debentureholders* 2008 SCC 69, the Court suggested at para. 65 that the conduct of shareholders may also support a case for oppression.

[53] It is clear the oppression action was intended to permit courts to remedy oppressive or unfairly prejudicial conduct not generally susceptible to correction by other forms of redress. Where the claimant already has a clear remedy – in contract, tort, or debt, for example – the court is unlikely to grant a remedy under s. 227. Thus McGuinness observes in connection with contractual claims:

> Where the sole complaint is that of a breach of contract, then a contract action should be pursued. Insofar as the contract deals with a specific matter, it seems only natural to conclude that it sets out exhaustively the underlying intentions, understandings and expectations of the parties. While many – perhaps all – breaches of contract can be characterized as oppressive to the injured party, and while many – perhaps all – forms of tortious injury may be said to be unfairly prejudicial, <u>the legislature clearly cannot have intended for the oppression provisions to serve as a panacea for all manner of legal wrongs, or to make the remedies created under the statute for genuine cases of oppression or unfair prejudice a substitute for the normal legal and equitable remedies that are available to aggrieved parties</u>. Where a simple breach of contract, or comparable legal wrong, has occurred, it is not appropriate for the court to invoke the oppression provisions of the Act merely because the party in breach is a corporation. It is arguable at least that insofar as a corporation remains able to satisfy the obligations owed to a creditor, no oppression proceeding is available, since in such a case the creditor cannot be said to have been unfairly prejudiced. In such a case, the appropriate remedy is an action for breach of contract. [At §13.77; emphasis added.]

[54] In summary, while oppression is a “personal” claim, not every personal claim that a shareholder may assert against a corporation will constitute oppressive or unfairly prejudicial conduct. The oppression or unfair prejudice must generally be suffered by the “shareholder” (as defined) *qua* shareholder: see *Dilligenti v. R.W.M.D. Operations Kelowna* (1976) 1 B.C.L.R. 36 (S.C.) at 41; *Burdeny v. K & D Gourmet Baked Foods & Investments Inc.* (1999) 48 B.L.R. (2d) 16 (B.C.S.C.) at para. 20; *Safarik v. Ocean Fisheries Ltd.* (1995) 12 B.C.L.R (3d) 342 (C.A.) at para. 85; *Stone v. Stonehurst Enterprises Ltd.* (1987) 80 N.B.R. (2d) 290 (Q.B.) at 305, quoted with approval in *Naneff v. Con-Crete Holdings Ltd*. (1995) 23 O.R. (3d) 481 (C.A.) at 489. On the other hand, as *Naneff* illustrates, where the complainant is able to show an entire course of oppressive conduct which <u>includes</u> another cause of action (in *Naneff*, wrongful dismissal), that cause may also be remedied under the oppression provision.

[55] In Canada, the oppression action has in recent years focused increasingly on the “reasonable expectations” of shareholders arising out of the web of statutory provisions, articles or bylaws, contractual terms, familial and personal relationships and other contextual factors in each particular case. In this sense, s. 227 is often described as providing an “equitable” remedy, despite its statutory origin. As Lord

Wilberforce observed in *Ebrahimi v. Westbourne Galleries Ltd*. [1973] A.C. 360 (H.L.):

> My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the *Companies Act* and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. [At 379; emphasis added.]

[56] In *BCE*, the Court referred with approval to *Ebrahimi* and continued:

> Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the *CBCA*. It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.
>
> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.
>
> Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.
> [At paras. 61-3; emphasis added.]

(See also *Naneff* at 487.)

[57] Turning to Skene Co.'s complaint that it was oppressed or unfairly prejudiced by CSA when Mr. Skene's signature was forged on engineering documents by Mr. Jeck, we see that this is a complaint belonging to Mr. Skene <u>as an engineer</u> rather than to Skene Co. <u>as a shareholder</u>. He may seek (or could have sought in a timely way) legal redress – in tort or contract or unjust enrichment – for the forgeries and the misuse of his seal, without being a shareholder of CSA, just as any engineer whose signature was forged could sue. Mr. Jeck's misconduct in forging the signature has little to do with the web of interests and expectations existing between the two shareholders or between Skene Co. and CSA; and it was not in my view so "intertwined" with the other acts of oppression in this case as to be inextricable therefrom. (See J.A. VanDuzer, "Who May Claim Relief from Oppression: The Complainant in Canadian Corporate Law" (1993) 25 *Ott. L. Rev*. 463 at 473.)

[58] I am not persuaded, then, that the trial judge erred in ruling that the claim was a personal one of Mr. Skene's, enforceable as a separate wrong, rather than one of Skene Co. arising out of the "compact of the shareholders". (*Per* Farley J. in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991) 3 B.L.R. (2d) 113 at para. 129 (Ont. Div. Ct.).) I would not accede to the second ground of appeal.

Management Fees

[59] I turn next to the management fees which Mr. Jeck caused CSA to pay to himself. Skene Co. asserted in its pleadings that these fees in total represented 86% of CSA's profits between 2004 and 2011.

(a) Onus

[60] Skene Co. framed its third ground of appeal to refer to the onus of proof, contending that although s. 147(4)(c) of the *Business Corporations Act* "provides a statutory exception to the general prohibition on self-dealing by fiduciaries", the fiduciary (in this case, Mr. Jeck as CSA's sole director) had the burden to prove that he exercised his power "in a manner that meets the high standards imposed on a fiduciary." In response, the respondents cite para. 165 of *BCE* to argue that the burden of proof was on Skene Co. to establish its reasonable expectations and that

they were breached in a manner oppressive or unfairly prejudicial to its interests as a shareholder.

[61] I am not persuaded the trial judge erred in placing the onus of proof on Skene Co. as the petitioner. That is where the onus lay: see generally McGuinness, *supra*, at §13.98 -13.99. If this were an action for breach of fiduciary duty (a duty owed by Mr. Jeck to CSA and not to Skene Co. as a shareholder), the onus of proof might shift to the respondents upon *prima facie* proof of a conflict of interest, but we are here concerned with an oppression claim. (See *Starcom Int'l Optics Corp. v. Macdonald* [1994] B.C.J. No. 548 (S.C.) at paras. 31-2.)

(b) Characterization

[62] Skene Co.'s fourth and final ground of appeal is that the trial judge conflated the fees payable to Mr. Jeck for <u>managing</u> CSA, with his compensation as an "<u>owner</u>" of the corporation. Skene Co. points in particular to the judge's comments at para. 276 of his reasons:

> … I have concluded <u>the reasonable expectations of the shareholders as to Mr. Jeck's remuneration had to account for Mr. Jeck's position and role at [CSA]</u>. It is important to recognize that Mr. Jeck was a sole manager; [CSA] would not necessarily pay a dividend which was at the discretion of the director in any event; Mr. Jeck would set his management fees as permitted by the articles; and Mr. Skene had no reasonable expectation to participate in management. All of that I think is true – however, Mr. Jeck's determination of his management fee <u>had to be tempered by the fact that he would ultimately share in any profits as a majority shareholder and that Mr. Skene was entitled to full disclosure of financial information about the company</u>.

and at para. 278:

> Overall, I have found that the failure to fulfil the requirement to provide audited financial statements or hold annual meetings, the misleading information about the company's performance coupled with the payment to Mr. Jeck of management fees that were high, and in the years 2010 and 2011 very high, were <u>cumulatively contrary to the reasonable expectation of both shareholders</u>. They demonstrate the operation of the company's affairs in a manner that was oppressive and unfairly prejudicial to the minority. <u>While the minority did not have a unfettered right to dividends or the right to set the manager's remuneration – that was Mr. Jeck's as the sole director</u> – the petitioner was entitled to accurate financial information and at any meeting [to] try to protect its proprietary interest. [Emphasis added.]

[63] For their part, the respondents contend that Mr. Jeck was authorized to set his own management fees by Article 12.2 of CSA's Articles, which constitute the "starting point" for an analysis of the shareholders' reasonable expectations. (See McGuiness, *supra*, at §13.40.)

[64] CSA's Articles were drafted under the previous *Company Act*. Article 12.2 permitted the board of directors to determine the "remuneration of the Directors" unless the board decided that the members should decide the matter. Article 15.1 and 15.2 are also germane:

> 15.1 A Director who is, in any way, directly or indirectly interested in an existing or proposed contract or transaction with the Company or who holds any office or possesses any property whereby, directly or indirectly, a duty or interest might be created to conflict with his duty or interest as a Director shall declare the nature and extent of his interest in such contract or transaction or of the conflict or potential conflict with his duty and interest as a Director, as the case may be, <u>in accordance with the provisions of the *Company Act*</u>.
>
> 15.2 A Director shall not vote in respect of the approval of any such contract or transaction with the Company in which he is interested and if he shall do so his vote shall not be counted, but he shall be counted in the quorum present at the meeting at which such vote is taken. This Article and Article 15.1 <u>shall not apply in those circumstances</u> where a Director is under the provisions of the *Company Act*, deemed not to be interested in a proposed contract or transaction. [Emphasis added.]

[65] Counsel seem to be in agreement that the references to the *Company Act* should now be read as references to the *Business Corporations Act.* Sections 147-150 thereof state in material part:

> 147 (1) For the purposes of this Division, a director or senior officer of a company holds a disclosable interest in a contract or transaction if
>
> > (a) the contract or transaction is material to the company,
> >
> > (b) the company has entered, or proposes to enter, into the contract or transaction, and
> >
> > (c) either of the following applies to the director or senior officer:
> >
> > > (i) the director or senior officer has a material interest in the contract or transaction;
> > >
> > > (ii) the director or senior officer is a director or senior officer of, or has a material interest in, a person who has a material interest in the contract or transaction.
>
> (2) For the purposes of subsection (1) and this Division, a director or senior officer of a company does not hold a disclosable interest in a contract or transaction if

(a) the situation that would otherwise constitute a disclosable interest under subsection (1) arose before the coming into force of this Act or, if the company was recognized under this Act, before that recognition, and was disclosed and approved under, or was not required to be disclosed under, the legislation that

(i) applied to the corporation on or after the date on which the situation arose, and

(ii) is comparable in scope and intent to the provisions of this Division,

. . .

(e) the director or senior officer is the sole shareholder of the company or of a corporation of which the company is a wholly owned subsidiary.

. . .

(4) For the purposes of subsection (1) and this Division, a director or senior officer of a company does not hold a disclosable interest in a contract or transaction merely because

. . .

(c) the contract or transaction relates to the remuneration of the director or senior officer in that person's capacity as director, officer, employee or agent of the company or of an affiliate of the company,

. . .

148 (1) Subject to subsection (2) and unless the court orders otherwise under section 150 (1) (a), a director or senior officer of a company is liable to account to the company for any profit that accrues to the director or senior officer under or as a result of a contract or transaction in which the director or senior officer holds a disclosable interest.

(2) A director or senior officer of a company is not liable to account for and may retain the profit referred to in subsection (1) of this section in any of the following circumstances:

. . .

(b) the contract or transaction is approved by the directors in accordance with section 149, other than section 149 (3), after the nature and extent of the disclosable interest has been disclosed to the directors;

(c) the contract or transaction is approved by a special resolution in accordance with section 149, after the nature and extent of the disclosable interest has been disclosed to the shareholders entitled to vote on that resolution;

. . .

(3) The disclosure referred to in subsection (2) (b), (c) or (d) of this section must be evidenced in a consent resolution, the minutes of a meeting or any other record deposited in the company's records office.

. . .

> 149 (1) A contract or transaction in respect of which disclosure has been made in accordance with section 148 may be approved by the directors or by a special resolution.
>
> (2) Subject to subsection (3), a director who has a disclosable interest in a contract or transaction is not entitled to vote on any directors' resolution referred to in subsection (1) to approve that contract or transaction.
>
> (3) If all of the directors have a disclosable interest in a contract or transaction, any or all of those directors may vote on a directors' resolution to approve the contract or transaction.
>
> (4) Unless the memorandum or articles provide otherwise, a director who has a disclosable interest in a contract or transaction and who is present at the meeting of directors at which the contract or transaction is considered for approval may be counted in the quorum at the meeting whether or not the director votes on any or all of the resolutions considered at the meeting.
>
> 150 (1) On an application by a company or by a director, senior officer, shareholder or beneficial owner of shares of the company, the court may, if it determines that a contract or transaction in which a director or senior officer has a disclosable interest was fair and reasonable to the company,
>
>> (a) order that the director or senior officer is not liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction, and
>>
>> (b) make any other order that the court considers appropriate.
>
> (2) Unless a contract or transaction in which a director or senior officer has a disclosable interest has been approved in accordance with section 148 (2), the court may, on an application by the company or by a director, senior officer, shareholder or beneficial owner of shares of the company, make one or more of the following orders if the court determines that the contract or transaction was not fair and reasonable to the company:
>
>> (a) enjoin the company from entering into the proposed contract or transaction;
>>
>> (b) order that the director or senior officer is liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction;
>>
>> (c) make any other order that the court considers appropriate.
>
> [Emphasis added.]

[66] In the respondents’ submission, s. 147(4)(c) exempts Mr. Jeck from any requirement to comply with the disclosure provisions of ss. 148 and 149; and Article 15.2 of CSA’s Articles confirm this result. Thus, the respondents say, the management fees were “authorized”. Moreover, they contend that Skene Co. could never have reasonably expected that Mr. Jeck would be precluded from taking a management fee unless it was recorded in a written resolution or as minutes of a meeting of the sole director. Since Mr. Jeck had had the authority to set his own

remuneration, the fact it was not recorded in a resolution each year did not "give rise to oppression or unfair prejudice to the minority shareholder, let alone any remedy as result."

[67] In my view, this argument misses the mark. Skene Co.'s complaint is not that the Act or CSA's Articles were not complied with; rather it is that Skene Co.'s reasonable expectations regarding financial statements were completely disregarded; Skene Co. was misled as to CSA's financial position; and Skene Co.'s right to participate in the corporation's earnings <u>to some extent</u> was unfairly prejudiced. Mr. Jeck actively lulled Mr. Skene into the belief that CSA was not doing well, so that Skene Co. did not 'expect' any significant return on its shares. Meanwhile, Mr. Jeck stripped CSA of most of its profits every year, not in the form of dividends in which both members would share, but in the form of "very high" management fees paid to himself and his wife. On this point, this court's observations in the recent case of *Jaguar Financial Corporation v. Alternative Earth Resources Inc.* 2016 BCCA 193 seem apt. Savage J.A. there stated for the Court:

> Section 147(4)(c) uses a very broad term "relates to". By this provision a matter is not a disclosable interest "merely because" the contract or transaction "relates to" the remuneration of the director or senior officer. There may be other grounds on which a director or senior officer has a disclosable interest but "merely because" some part of the contract or transaction relates to the remuneration of the director or senior officer is not a basis for there being a disclosable interest.
>
> The Supreme Court of Canada in *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430 at 445, held that the words "relating to" describe "the widest of any expression intended to convey some connection between two related subject matters". In my opinion, if a contract or transaction involves a number of matters, one of which is the remuneration of a director or senior officer, the contract or transaction "relates to" each of those matters. Thus, s. 147(4)(c) of the *BCA* excepts a contract or transaction from creating a disclosable interest merely because one facet involves the remuneration of directors and senior officers. Of course, other provisions of the contract or transaction considered in context may disclose material interests which *are* disclosable interests.
>
> Further, I <u>agree with Jaguar that the qualifier "merely" also implies that given remuneration may still amount to a disclosable interest depending on the magnitude of the remuneration</u>. For example, a contract resulting in an excessive director's fee or excessive remuneration as a senior officer is not a disclosable interest *merely* because it relates to a director's or senior officer's remuneration, <u>but it still may be a disclosable interest because the director's fee or senior officer's remuneration is so excessive as to be out of the ordinary</u>. That is not the case here. There is no evidence that director's fees

> or employment benefits would be excessive in any way. [At paras. 81-3, emphasis added.]

[68] There are several authorities that support the proposition that at least in a closely-held corporation, a majority shareholder's appropriation of management fees in disregard of the interests or expectations of the minority may constitute oppression; and that a majority shareholder who treats the company treasury as if it were his or her own will be found to have oppressed the minority. Indeed, in *BCE*, the Court specifically suggested at para. 93 that "preferring some shareholders with management fees" is generally seen as unfair prejudice. (See also the discussion of "self-dealing" in Koehnen, *supra*, at 124-7.)

[69] There are several older British Columbia cases that support this proposition. I note a case decided by Mr. Justice Wallace, then of the Supreme Court of British Columbia, in 1983 in *Faltakas v. Paskalidis* (1983) 45 B.C.L.R. 388. It did not involve the appropriation of management fees, but did involve self-dealing by the majority shareholders through their nominee directors, contrary to the interests and expectations of the minority. In the course of his reasons, Wallace J. observed:

> A member, unlike a director, is not in a fiduciary position with respect to the company or his fellow shareholders. His rights are determined by the articles of association of the company and accordingly, in passing the resolution in question at the annual general meeting, <u>the respondents have only done that which they have a legal right to do. However, that is not an end to the matter</u>, Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.* … at 500 stated ... :
>
>> The just and equitable provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense from it. <u>It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way</u>.
>
> In the instant case although the considerations in conflict are not those between legal and personal obligations but rather arise from the conflict between the duties of a person in his role as director and his rights and privileges in his role as a member, I am of the view the same principles apply. <u>The court will subject the exercise of the member's legal rights to equitable considerations where they are in conflict with his duties as a director and their exercise would be oppressive or unjustly prejudicial to one or more members</u>. [At 392-3; emphasis added.]

[70] In 1986, in *Low v. Ascot Jockey Club* (1986) 1 B.C.L.R. (2d) 123 (S.C.), Southin J., as she then was, stated in a similar vein:

> Before April 1984 Mr. Randall required only the assent of his son to his siphoning off of the profits as bonuses and management fees. The company had no creditors to speak of and such a method of distributing profits does not appear to upset Her Majesty's revenue.
>
> Once, however, the petitioners became shareholders, such a course of action was no longer permissible. That Mr. Randall was and is entitled to substantial remuneration for his services, I do not doubt. But half a million dollars a year would be considered generous for a chief executive officer of one of Canada's larger corporations.
>
> Whether if the board of directors resolve to pay such amounts the resolution could be attacked, I do not decide. In this case, there is no evidence of any resolution in 1984 to fix the remuneration or of a resolution in 1985 to pay it. The evidence leads irresistibly to the conclusion that, having had such remuneration in the past, Mr. Randall, Sr. considered he was entitled to go on receiving it by the simple expedient of the accountants making the appropriate entries in the 1984 financial statements.
>
> Such a course of conduct is oppressive within s. 224(1)(*a*) [of the *Company Act*]. [At 130; emphasis added.]

(See also *Ludlow v. McMillan* (1995) 19 B.L.R. (2d) 102 (B.C.S.C.) at paras. 10-13; *Wright v. Donald S. Montgomery Holdings Ltd.* (1998) 39 B.L.R. (2d) 266 (Ont. Gen. Div.) at paras. 34-8; *Brokx v. Tattoo Technology Inc.* 2004 BCSC 1723 at paras. 11-14; *Loveridge Holdings Ltd. v. King-Pin Ltd.* (1991) 5 B.L.R. (2d) 195 (Ont. Gen. Div.) at para. 17.)

[71] At the same time, the payment of excessive management fees to, or other self-dealing by, the majority or corporate directors also constitutes a wrong to the corporation. A complaint of this kind can therefore be brought as a derivative action on the corporation's behalf if leave of the Court is obtained under s. 232. This fact, not considered in many of the cases cited above, brings us back to the 'overlap' between derivative and oppression actions, a subject much discussed by courts and learned authors, especially since J.G. MacIntosh published his seminal article, "The Oppression Remedy: Personal or Derivative?" (1991) 70 *Can. Bar Rev*. 29.

[72] In this province, the relationship between the two actions has been resolved by the principle that where a petitioner under s. 227 complains of a wrong (usually breach of fiduciary duty) to the corporation, an oppression action is unlikely to be

appropriate unless he or she suffered some loss or damage "separate and distinct from" the indirect effect of the wrong suffered by all shareholders generally: see *Pasnak v. Chura* 2004 BCCA 221 at paras. 32-3, citing *Goldex Mines Ltd. v. Revill* (1974) 54 D.L.R. (3d) 672 at 679-80 (Ont. C.A.) and *Furry Creek* at 254.

[73] This principle was re-confirmed in 2007 in *Robak Industries Ltd. v. Gardner* 2007 BCCA 61 after a thorough review of various English and New Zealand authorities, including *Johnson v. Gore Wood & Co*. [2002] 2 A.C. 1 (H.L.); *Prudential Assurance Co. v. Newman Industries Ltd. (No. 2)* [1982] 1 All E. R. 354 (C.A.); *Christensen v. Scott* [1996] 1 N.Z.L.R. 273 (C.A.); and Canadian authorities including *Hercules Management*, *supra*; and *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002) 220 D.L.R. (4th) 611 (Ont. C.A.). Levine J.A. for the Court held in *Robak* that a claimant under s. 227 must show some loss or particular detriment beyond a diminution in the value of his or her shares. She continued:

> The appellants refer to other portions of the judgment in *Johnson v. Gore Wood* and the other cases in which a claim for diminished value of shares was found to be justified. My reading of these cases, however, leads me to conclude, in agreement with the respondents, that <u>there is no principle articulated there that would allow a shareholder to claim damages for the loss of value in the shares of a company that is consistent with the legal theories adopted in the Canadian authorities (principally *Hercules*) and applied consistently in Canada.</u>
>
> . . .
>
> … The chambers judge did not decide, contrary to the appellants' arguments, that a shareholder may <u>never</u> bring a claim for the diminution in the value of the shareholder's shares, but confirmed, by reference to *Hercules* and [*Haig*, *v. Bamford* [1977] 1 S.C.R. 466], that <u>a shareholder may have a cause of action for loss in the value of shares where the shareholder has both an "independent relationship" with the wrongdoer and an "independent loss" from that of the company to whom the wrong has been done</u>. She decided that in this case, the appellants had not shown that they have a cause of action for an "independent loss" in respect of wrongs done to [the company]. [At paras. 28, 38; emphasis added.]

[74] More recently, in *Jaguar Financial*, *supra*, the Court discussed the issue at paras. 177-188 and concluded that certain examples of oppression referred to in *BCE* should not be interpreted as authority for 'collapsing' the distinction between oppression and derivative actions. Savage J.A. reasoned:

> Furthermore, there are scenarios where *BCE*'s examples, such as paying directors' fees higher than industry norms, could result in a shareholder experiencing distinct harm and therefore reconcile *BCE* with the other authorities. The size, nature and structure of a corporation is a key element in the analysis. Thus, in a closely-held corporation, the payment of a director's fee may be in breach of an expectation that all monies would be paid out of the corporation to the shareholders in proportion to the shares held (*BCE*, para. 76). This would be a distinct harm as paying a director's fee would not only affect the company but separately and distinctly harm the other shareholder who alone would not receive a fee.
>
> Clearly these scenarios will arise more frequently in closely-held corporations, as was the case in *Brokx v. Tattoo*, 2004 BCSC 1723, a decision relied upon by Jaguar. I note that in two other decisions referenced by Jaguar, majority shareholders were found to perpetrate oppressive conduct against minority shareholders: *International Energy and Mineral Resources Investment (Hong Kong) Co. v. Mosquito Consolidated Gold Mines Ltd.*, 2012 BCSC 1191 at para. 126; and *Jellema v. American Bullion Minerals Ltd.*, 2010 BCCA 495 at para. 7. [At paras. 184-5; emphasis added.]

The Court went on to emphasize the importance of the corporate context in considering whether the claimant in an oppression action has shown "peculiar prejudice distinct from the alleged harm suffered by all shareholders indirectly".

[75] A decision of the Ontario Court of Appeal suggested a softening of the "particular loss" requirement in 2008. *Malata Group (HK) Ltd. v. Jung* 2008 ONCA 111 involved a company ("M") that had three shareholders one of whom was the plaintiff, holding 18% of the shares. He was also a creditor of M. The other two shareholders held 41% each and were the only directors and officers of M. The plaintiff alleged that one of the other shareholders had misappropriated corporate funds in breach of his fiduciary duty, and sought a return of those funds back to M via an oppression claim. The defendant applied to strike out the claim on the basis that it was derivative in nature and therefore required leave. The issue on appeal was whether the chambers judge had been correct in allowing the claim to proceed as an oppression action.

[76] The Court began its analysis by suggesting the absence of a "bright-line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions." Previous case law had recognized that there is indeed a degree of overlap between the two (para. 30), often where the directors of a closely-held

corporation engage in self-dealing to the detriment of the corporation and other shareholders or creditors. (Para. 31.) The Court noted and agreed with *C.I. Covington Fund Inc. v. White* [2000] O.J. No. 4589 (S.C.J.) where Swinton J. had stressed the "broad discretion" conferred on courts by the Ontario oppression provision, and had noted that it had been used to make "compensation orders against individual directors where their conduct has been found oppressive in small closely-held corporations … and they have benefited – for example, by the removal of assets from the corporation." (At para. 46.) Armstrong J.A. then concluded in *Malata*:

> <u>It is important in my view that in this case, we have a closely held corporation.</u> It seems to me that if the alleged oppressive conduct is made out when Malata HK is one of three shareholders and, more particularly, is a major creditor of Malata Canada, it is appropriate for Malata HK to seek a return of the monies to Malata Canada under s. 248 of the Act. Malata HK could have proceeded by way of a derivative action. However, given the overlap between ss. 246 and 248 of the Act and the particular circumstances of this case, I do not believe that it was required to do so.
>
> In disputes involving closely held companies with relatively few shareholders, such as the case at bar and *Covington*, <u>there is less reason to require the plaintiff to seek leave of the court. The small number of shareholders minimizes the risk of frivolous lawsuits against the corporation, thus weakening the main rationale for requiring a claim to proceed as a derivative action.</u>
>
> In the result, I am satisfied that the claims in subparagraphs 1(c), (d) and (e) of the statement of claim are properly advanced under the oppression remedy section of the Act. It is important in my view that in this case, we have a closely held corporation. It seems to me that if the alleged oppressive conduct is made out when Malata HK is one of three shareholders and, more particularly, is a major creditor of Malata Canada, it is appropriate for Malata HK to seek a return of the monies to Malata Canada under s. 248 of the Act. Malata HK could have proceeded by way of a derivative action. However, given the overlap between ss. 246 and 248 of the Act and the particular circumstances of this case, I do not believe that it was required to do so.
> [At paras. 38-40; emphasis added.]

[77] Some years later, however, the Ontario Court of Appeal in *Rea* took a more rigorous view, and explained *Malata* on the basis that the misappropriation of funds in that instance had affected "not only the company (and therefore the indirect interests of all shareholders), but the direct interests of the minority shareholder, a <u>creditor of the company</u>." (At para. 31; my emphasis.) The Court in *Rea* went on to observe:

> <u>That the harm must impact the interests of the complainant personally – giving rise to a personal action – and not simply the complainant's interests as part of the collectivity of stakeholders as a whole – is consistent with the reforms put in place to attenuate the rigours of the rule in *Foss v. Harbottle*</u>. The legislative response was to create <u>two</u> remedies, with two different rationales and to separate statutory foundations, not just one: a corporate remedy, and a personal or individual remedy.
>
> The derivative action provides aggrieved minority stakeholders with the ability to pursue a cause of action on behalf of the corporation to redress wrongs done in respect of the corporation, provided leave is obtained from the court to do so. As Professor MacIntosh has observed:
>
>> The corporation will be injured when all shareholders are affected equally, with none experiencing any special harm. By contrast, in a personal (or "direct") action, the harm has a differential impact on shareholders, whether the difference arises amongst members of different classes of shareholders or as between members of a single class. It has also been said that in a derivative action, the injury to shareholders is only <u>indirect</u>, that is, it arises only because the corporation is injured, and not otherwise. [At paras. 35-6; emphasis added.]

[78] At the end of the day, I remain bound by, and respectfully agree with, the principle that the claimant in an oppression action must show particular prejudice or damage beyond the diminution in value of his or her shares as a result of the allegedly oppressive conduct.

[79] In the case at bar, Skene Co. did not seek damages for any diminution in the value of its shares in CSA. Rather it sought to have its shares purchased for a price calculated as if the fees had not been paid out, or alternatively, 44% of the fees (which it calculated as $3,205,494 in total) as damages or 'disgorgement'. In the alternative, if leave to sue derivatively were granted, it sought an order that the fees be repaid to CSA and that CSA be ordered to pay 44% of them to Skene Co. as dividends.

[80] In my view, Skene Co. has shown particular prejudice or damage, personal to itself, and should not be required to sue derivatively. As seen earlier, the trial judge found that Mr. Jeck treated CSA "as if it was his alone" and without regard for the minority shareholder's position (para. 275) and that Mr. Jeck had been motivated by the hope of buying Skene Co. out of CSA cheaply. Thus it may be said that Mr. Jeck's appropriation of a large proportion of CSA's earnings over several years without the payment of any dividend or other benefit to Skene Co. formed <u>part and</u>

parcel of the sustained and deliberate course of conduct that was unfairly prejudicial to Skene Co. The prejudice was suffered solely by Skene Co. as the minority shareholder; obviously, no other shareholder suffered loss or prejudice. Indeed the fact all of this occurred against the background of a two-member corporation is a key contextual factor: if Skene Co. were required to bring a derivative action on behalf of CSA against Mr. Jeck to recover the "excessive" management fees, the court would likely order that they be repaid to CSA. It of course is controlled by Mr. Jeck; thus the remedy would be wholly counterproductive.

[81] It will be recalled that the trial judge stated at para. 156 of his reasons that oppression is not to be assessed in isolation, but in "combination and context" with all other factors. He also found that Mr. Jeck's conduct with respect to the falsified corporate records and the disinformation regarding its business success, "coupled with" the payout of the "very high" management fees, were "cumulatively contrary to the reasonable expectations of both shareholders." (Para. 278.) I believe that when he came to the matter of remedy, however, he erred in law and in principle in failing to hold Mr. Jeck accountable in some way for that important aspect of his oppressive conduct. The judge did, in other words, isolate the payment of the management fees to Mr. Jeck from his other misconduct. Seen in context, the appropriation of those funds was in fact the culmination of the oppressive and unfairly prejudicial actions perpetrated since at least 2006. The fees made the forgeries and misinformation financially worthwhile – otherwise there was little point in Mr. Jeck's keeping the true picture from Skene Co. This conduct should not go unremedied.

[82] I also believe, with respect, that the trial judge erred in assuming (see paras. 275-8 of his reasons quoted above at para. 29) that because Mr. Jeck held a majority of shares, he could reasonably expect to receive all the profits of CSA from time to time, while Skene Co. could expect only "full disclosure of financial information." Most shareholders, even minority shareholders, make their investment in hopes (which in a successful corporation may become reasonable expectations) of dividends or other financial returns. Having misled Mr. Skene as to CSA's success, Mr. Jeck cannot now be heard to say that Skene Co. did not expect and could not have reasonably expected to share in the profits of the corporation. In fact,

Skene Co. was entitled to expect <u>some</u> return, given CSA's continuing success. The 'indoor management' rule cannot be relied upon by Mr. Jeck with respect to the fees: obviously he did not consider it necessary in CSA's interests to retain a significant proportion of the profits each year for future business expansion or other corporate purposes. Instead, large amounts of profits were simply siphoned off by Mr. Jeck to himself.

[83] It is certainly true Mr. Jeck was 'running' the business and was entitled to some reward as "an owner" of CSA. But he was not the <u>only</u> "owner" and he was not entitled to treat CSA's treasury as his own. The balance between majority and minority lay in determining what return to Mr. Jeck was reasonable and what was "excessive".

Remedy

[84] As mentioned, the trial judge had expert evidence before him on the question of whether Mr. Jeck's "remuneration" had been excessive. The evidence of Mr. Lyon, an engineering recruiter, was that an outside manager in a company like CSA would expect compensation not exceeding $164,000 annually as an "absolute maximum". The trial judge did not find this evidence altogether satisfactory because "the role performed by the hypothetical person in Mr. Lyon's scenario that is the basis of his opinion was not the role performed by Mr. Jeck for CSA". There was also evidence from a compensation consultant, Mr. Cook, who opined that an individual competent to perform the role of president of CSA would normally have been paid between $271,000 and $375,000 plus other benefits. The trial judge commented:

> One difficulty with the expert evidence in this case on both sides was that neither expert directly addressed the appropriate compensation in the marketplace for a person precisely in Mr. Jeck's position.
>
> Mr. Jeck, in my view, did not fill the role that was simply the equivalent of a manager but had responsibility for all aspects of the company's business. On the other hand, Mr. Cook's comparison of compensation paid to persons running similar small businesses as CEOs with bonuses for success was not completely accurate, because <u>Mr. Jeck was also a majority owner of the company and in that capacity would benefit from success</u>.
>
> Accordingly, I found the opinion evidence overall to be of limited assistance in determining whether in comparison to some industry norm it could be said

> that the management fees were excessive or not. [At paras. 146-8; emphasis added.]

He then concluded:

> I find Mr. Jeck has been very well rewarded for his efforts by the compensation he has received. The figures for 2010 and 2011 are high, even by Mr. Cook's analysis. However, I am drawn to the conclusion that while the remuneration Mr. Jeck awarded himself was quite high, given that he has a majority equity interest and as majority owner is able to benefit from his shareholding if the company does well, the remuneration he has received overall was not shown to be so high that, <u>in and of itself,</u> it was oppressive or unfairly prejudicial.
>
> The question however arises whether very high compensation to the majority shareholder, particularly as was the case in 2010 and 2011, if not in of itself oppressive or unfairly prejudicial, is a factor that may be taken into account when considering whether the petitioner has demonstrated oppressive or unfairly prejudicial conduct. [At 153-4.]

[85] I am reluctant to remit the issue of remedy, which has dragged on for many years, back to the trial judge for determination of what part of the management fees was excessive. The "medium range" referred to by Mr. Cook was between $292,000 and $301,000 plus benefits. I would assume a figure of $300,000 (including benefits) to be appropriate and anything more to be "excessive". It was not until 2007 that Mr. Jeck "earned" more than $300,000 from CSA. In 2007–2009, he earned an average of $ 306,880, so that the excess portion was $6,880. In 2010, he earned $634,262, so that the "excess" was $334,262; for 2011, he earned $511,156, so that the excess was $211,156. These excess fees come to a total of $566,058**.** It seems to me that Mr. Skene could have reasonably expected that CSA would pay this "excess" out as dividends and that Skene Co. would receive its 44% share thereof, or $249,065. Mr. Jeck on the other hand could receive the remainder in recognition of <u>his</u> 'ownership' share and the expectations inherent therein.

[86] I realize, however, that an order that Mr. Jeck pay $249,065 to Skene Co. might not be tax-efficient and that the parties may wish to suggest other ways in which the minority's reasonable expectations can be realized by means of an order under s. 227. I would therefore allow the appeal to the extent of finding that Mr. Jeck's causing CSA to pay the management fees to him constituted oppressive or unfairly prejudicial conduct. I would request any written submissions of the

respondents no later than June 30 as to any order they might propose as an alternative to an order that Mr. Jeck pay Skene Co. the sum of $249,065. The petitioner would then have a month in which to respond with its written submissions. Failing such submissions, the order will go that Mr. Jeck pay $249,065 to Skene Co.

[87] Of course, if counsel are able to agree on a different solution, that would be all the better.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Willcock"