COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gierc Jr. v. Wescon Cedar Products Ltd.,* 2025 BCCA 239

Date: 20250708
Docket: CA48950

Between:

Frank Gierc Jr. and 628578 B.C. Ltd.

Appellants
(Petitioners)

And

Wescon Cedar Products Ltd., Wescon Holdings Ltd. and Thomas Gierc

Respondents
(Respondents)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Grauer
The Honourable Justice Fleming

On appeal from: An order of the Supreme Court of British Columbia, dated February 24, 2023 (*Gierc Jr. v. Wescon Cedar Products Ltd.*, 2023 BCSC 272, Victoria Docket 160716).

Counsel for the Appellants:	G.N. Harney
Counsel for the Respondents:	P. Roberts, K.C.
Place and Date of Hearing:	Victoria, British Columbia April 8, 2025
Place and Date of Judgment:	Vancouver, British Columbia July 8, 2025

Written Reasons by:
The Honourable Justice Fleming

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

Summary:

The court ordered the respondents to purchase the shares of the appellants as the remedy for the appellants' successful oppression claim. The appellants challenge the judge's dismissal of other remedies they sought and submit that the judge erred in valuing the shares.

Held: Appeal dismissed. The judge made no reviewable error in exercising her discretion not to make the other compensatory orders the appellants sought. Her valuation of the shares was based on the evidence before her and discloses no reviewable error.

Reasons for Judgment of the Honourable Justice Fleming:

Introduction

[1] The appellants, Frank Gierc Jr. and his company 628578 B.C. Ltd. ("578"), brought an oppression claim against the respondents and sought relief under s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*].

[2] Frank Gierc Jr. and the respondent, Thomas Gierc, are brothers. For clarity, I will refer to them by their first names.

[3] Started by Frank and Tom with the financial backing of their parents, the respondent Cedar Products Ltd. ("Cedar") was incorporated in 1985. Cedar manufactures and sells wood products. Its primary business is manufacturing doors. From Cedar's inception Frank and Tom were shareholders, directors and employees. Tom terminated Frank's employment in August 2015. The respondents also excluded Frank from the premises and denied him access to information.

[4] In reasons indexed at 2021 BCSC 23, the chambers judge found the respondents had engaged in oppressive and unfairly prejudicial conduct toward Frank and it would be just and equitable to provide a remedy under s. 227(3) of the *BCA* ("Oppression Judgment"). At a subsequent hearing, the judge determined the appropriate remedy was to require the respondents to purchase Frank's shares. She dismissed his other claim for compensation, including 13 months' salary or wages. The judge valued the shares based on the only valuation report in evidence and ordered Cedar to purchase Frank's shares for half that total amount, plus pre-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 [*COIA*] ("Remedy Judgment").

[5] Frank appeals from the Remedy Judgment. He argues the judge erred in denying him compensation for the termination of his employment, awarding simple court-ordered interest instead of compound pre-judgment interest, accepting the valuator's midpoint share value, and making a "deduction" of goodwill.

[6] For the reasons that follow I would dismiss the appeal.

Background

[7] Cedar operates from a property on Polkey Road in Duncan ("Polkey Road"). Prior to a corporate restructuring in 2001, Frank, Tom, and each of their parents owned 25% of the common shares in Cedar. The intention was always that Cedar would be closely owned and operated by Frank and Tom. In addition to Frank and Tom, Tom's wife, and both Frank's and Tom's children have also worked for the business.

[8] The 2001 restructuring resulted in the following:

1. the respondent, Wescon Holdings Ltd. (Holdings), was incorporated and became the beneficial owner of Polkey Road;
2. Frank, Tom and their parents traded their common shares for fixed value shares equal to Cedar's value at that time;
3. new shares were also issued that would obtain value only if Cedar and Holdings increased in value;
4. the share structure was designed to limit voting interests from being distributed outside the family; and
5. a number of trusts were created to hold shares in Cedar and Holdings that did not change the share structure.

[9] Regarding the trusts, the overriding objective was the trustees, Frank and Tom, had the discretion to assist beneficiaries, all of whom were family members (through the distribution of income and capital of the trust), because "it is all about family taking care of each other".

[10] There were no shareholder agreements with respect to either Cedar or Holdings.

[11] After the appellants filed the oppression petition in February 2016, the parties entered into an interim settlement agreement effective July 26, 2016 ("Settlement Agreement"). The material terms include:

1. the preferred shares in Cedar and Holdings held by 578 would be redeemed for $638,188 ("Redemption Amount");

2. 578 would be paid $100,000 as an advance on the Redemption Amount once: (i) Frank resigned as a director and officer of Cedar and Holdings; (ii) Frank and 578 executed a non-competition agreement with Cedar; and (iii) Frank transferred ownership of a vehicle belonging to Cedar that was in his possession to himself personally; and

3. the remaining balance of the Redemption Amount, less a holdback of $150,000 ("Redemption Holdback"), would be paid once an appraisal of the fair market value of Polkey Road as at January 31, 2016 ("Agreed Upon Valuation Date") was obtained; Frank transferred his 50% legal interest in Polkey Road to Tom; and Tom obtained financing using Polkey Road as security.

[12] Further to the Settlement Agreement, on July 29, 2016, Frank resigned as a director of Cedar and Holdings and signed a non-competition agreement. By November 2017, Frank had not received the payout under the Settlement Agreement. In need of funds, he and his wife cashed in RRSPs, and he started working at a building supply store as a door hanger. Tom took the position that Frank's job violated the non-competition agreement and release of the funds was contingent on Frank resigning. Frank said he would resign upon payment of the balance owing, without conceding a breach.

[13] In February 2018, Tom made a partial payment of $374,197.27 that set off $94,450.77 for what he identified as Frank's share of certain tax liabilities and without prejudice to the asserted violation of the non-competition agreement. Frank and 578 brought an application for final payment under the Settlement Agreement. Justice Punnett found the respondents had breached the Settlement

Agreement by setting off the $94,450.77 and ordered judgment against them in that amount plus costs payable forthwith (“Punnett Judgment”).

[14] By the time of the Oppression Judgment in January 2021, the respondents had paid the Punnett Judgment but not the costs. The last tranche of the Redemption Holdback was paid in August 2022.

Oppression Judgment

[15] In addressing the roles of Tom and Frank regarding Cedar’s operations, the judge accepted that Tom was primarily responsible for managing the business, and Frank for the manufacturing. She found each was paid only for the work they performed as employees and not as stakeholders. No dividends were ever paid to any shareholder.

[16] The judge also found that relations between Tom and Frank were deteriorating by 2014. Indicating each blamed the other, she summarized their evidence. Frank felt excluded because Tom was making significant business decisions without consulting him. Tom said that Frank had gradually withdrawn from the business and become increasingly difficult to work with, causing several employees to quit and others to complain. After terminating Frank, the judge wrote, Tom stopped paying Frank his monthly draw, although she accepted in the Remedy Judgment that Frank received 11 months’ salary.

[17] The judge recited much of s. 227(1) through (3) of the *BCA* and some general propositions and principles regarding the oppression remedy from *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 in discussing the legal framework.

[18] *BCE* established that in assessing a claim of oppression, a court must answer two questions: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[19] Turning to the question of reasonable expectations, the judge identified the factors to be considered as described in *BCE* at paras. 72–84: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and

agreements; and the fair resolution of conflicting interests between corporate stakeholders. She also observed that family companies bring different expectations than other businesses.

[20] The judge accepted the two expectations that Frank asserted were reasonable and established by the evidence:

> 1. On the passing of his parents, he would be a 50% “partner” of a business he helped build and he would share equally in the value of the company and the profits; and
>
> 2. Tom would act in Frank’s best interest and certainly not in a manner hurtful to him.

[21] The judge then considered the nature of oppressive and unfairly prejudicial conduct as discussed in *BCE* (at para. 67) and *Walker v. Betts*, 2006 BCSC 128 (at paras. 80 and 90). Based on *Walker*, the judge also recognized that while a single act may not constitute oppressive or unfairly oppressive conduct, the combination of acts must be examined in their totality.

[22] The oppressive conduct that Frank asserted, outlined at para. 89 of the Oppression Judgment, included:

> 1) terminating his employment as a co-director, which cannot be done unilaterally. A termination has to be done by the Board of Directors, which in Wescon was Frank and Tom until Frank resigned in order to facilitate the Agreement;
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> 2) excluding him from the premises/property;
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> 3) failing to provide him full audited financial statements;
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> 4) instructing company employees, including bookkeeping and accounting personnel, not to share information with him;
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> 5) frustrating the appointment of an auditor;
>
> 6) failing to keep him apprised about the businesses being run from the property, including wooden window manufacturing and the storage business being run by Tom’s son on the Polkey Road property;
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> 7) not paying him any benefits from the company- no share of the rent, no share of the income, no interest;
>
> 8) failing to pay the funds under the Agreement in a timely manner. Despite Tom’s agreement to diligently pursue financing and the fact that there is virtually no debt in the company, it took about 19 months for Frank to be paid- and then it was not the total amount agreed upon; and
>
> 9) failing to pay costs ordered by Punnett J. on July 27, 2018.

Summarizing his assertions, the judge wrote: “Overall, Frank argues that after 30 years of building the business with his brother, he has been excluded from participating in the business or knowing anything about it”: at para. 90.

[23] She went on to “agree with Frank’s assertions of unfair treatment” before making the following findings (at para. 93):

> 1) Frank is not only no longer permitted to participate in the business in any way, he has been effectively excluded from information regarding the company and his share of the value/profits;
>
> 2) Tom stalled in paying out Numbered Co. as per the Agreement knowing the hardship that it would cause Frank;
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> 3) Tom and Frank’s relationship with each other has deteriorated to the point that communication is no longer possible. Tom’s animosity toward Frank was evident in the courtroom during this hearing. Tom’s animosity toward Frank’s family is also clear from the evidence; and
>
> 4) Tom is not acting in the best interests of Frank, contrary to the terms of the trusts and the intention of Wescon to take care of family.

[24] At the end of her analysis, the judge wrote she was satisfied the “above enumerated conduct engaged in by Tom and the respondent companies” was contrary to Frank’s reasonable expectations, before commenting again that he had been untreated unfairly and the respondent’s actions were oppressive: at para. 99.

[25] The Oppression Judgment included a series of interim orders aimed at providing “fundamental” information for the remedy stage (requiring the respondents to appoint an auditor, produce audited financial statements and hold an annual general meeting (“AGM”) within prescribed timelines) and preserving the status quo in the meantime.

Valuation Report

[26] On April 7, 2021, the parties obtained a valuation of Polkey Road as of the Valuation Date, which valued the property at $4,465,000. Audited financial statements for Cedar and Holdings were finalized in January 2022. In February 2022, the parties engaged business valuator Josh Matte, of XPS Group Inc., to provide a valuation report regarding the issued and outstanding shares of Cedar and Holding. Provided with the Polkey Road appraisal and the audited financial statements, Mr. Matte was also asked to consider a historical equipment appraisal.

[27] In the XPS report dated July 13, 2022, Mr. Matte opined that a combined *en bloc* fair market value of the Holdings and Cedar shares as of the Valuation Date was in the range of $4,389,000 to 4,904,400, with the Holdings' shares having a low value of $3,485,000 and a high value of $3,743,000, and the Cedar shares, a low value of $904,000 and the high value at $1,161,000.

[28] As part of his analysis Mr. Matte assessed and considered the calculated goodwill for Cedar:

> The resulting range of values implies a market value of goodwill in [Cedar] of ($1,371,000) to $1,114,000) per Schedule 5.0. The calculated goodwill is negative, and therefore implies that [Cedar] is not able to generate expected market rates of return on its operating assets, suggesting possible impairment of operating assets.

[29] In their written submissions on remedy, the appellants argued:

1. Frank should be awarded compensation for "loss of salary and benefits for a period to be determined";

2. XPS should not have "deducted" goodwill in calculating the fair market value of Cedar and Holdings; and

3. interest of 5% per annum compounded on all values should be awarded.

A revised version of the appellants' submissions was sent to XPS for comment with respect to the issue of goodwill. Mr. Matte made no change to the XPS report.

Remedy Judgment

[30] The judge remarked that the only remedy sought in Frank's pleadings "and the appropriate remedy in the circumstances" was to direct the respondents to purchase his shares. She indicated that in addition "to seeking compensation for the oppression", Frank was seeking payment for 13 months of salary/compensation "over and above the 11 months he was paid following his termination". Noting Frank argued he was entitled to 24 months "as that is the usual amount of time" but without providing any authority, the judge went on to find it was "clear on the evidence that the monthly payments were for work done— 'no work, no pay'": at para. 9. She concluded therefore that Frank was bringing the

claim for additional wages *qua* employee not *qua* shareholder and dismissed it as having no merit.

[31] Turning to decide on the "fair market value" of the shares, the judge acknowledged Frank took issue with some aspects of the XPS report, but accepted Mr. Matte's valuation, in the absence of any contrary opinion evidence. She also considered Frank's submissions that the shares should be valued at the high end of the range of value provided by Mr. Matte along with his advice on the range.

[32] In deciding to value the shares at the midpoint, she reasoned:

> [15] After much consideration, I conclude that I cannot predict the future of the assets of Wescon with any certainty. While the company was formed by the brothers with the help of their parents, with the apparent intention that it would be kept in the family for generations, much has changed since then. The parents have passed away, and the brothers have had a falling out. The economy has changed dramatically.
>
> [16] Tom is not a young man. He deposes that his workload has increased significantly since Frank left. The business has been affected by inflation and rising interest rates. I have no information upon which I can draw a conclusion about Tom's plans for his future or the future of the company.
>
> [17] Left with uncertainty around whether the assets will be sold in the next 14 years, I accept the midpoint as the value of the shares. Given this value, relying on the XPS report, and the uncontroverted evidence of Mr. Olsen, the long-time accountant of Wescon, I find that the aggregate median *en bloc* fair market value of the shares to be $4,646,500...

[33] The judge concluded Frank was entitled $2,323.250 and pre-judgment interest under the *COIA* from the Valuation Date—January 31, 2016— "less allowances for payments previously made".

Issues on Appeal

[34] In summary, the appellants assert the judge erred by:

1. refusing to grant Frank any additional compensation for the termination of his employment and compounded interest from the Valuation Date;

2. impliedly determining Frank was not entitled to compensation as an aggrieved person;

3. accepting the deduction of goodwill in the XPS report; and

4. accepting the midpoint of the valuation in valuing the shares.

Standard of Review

[35] Under the oppression remedy the court has a broad discretion to grant an appropriate remedy: *BCE* at para. 58; *Radford v. MacMillan*, 2018 BCCA 335 at para. 87. Accordingly, decisions regarding whether to grant an oppression remedy or the choice of remedy are afforded considerable defence on appeal. Absent a palpable and overriding error, this Court will only interfere if the judge acted on a wrong principle, gave insufficient or no weight to relevant considerations, or made a decision that is so clearly wrong it results in an injustice: *Khela v. Phoenix Homes Limited*, 2015 BCCA 202 at para. 38; *Esposito v. Esposito*, 2022 BCCA 51 at para. 17; *Dubois v. Milne*, 2020 BCCA 216 at para. 95; and *Wilson v. Alharayeri*, 2017 SCC 39 at para. 59.

Issues one and two – additional compensation

[36] During the hearing of the appeal, the appellants suggested the first and second grounds should be considered together. Their submissions focused on the notion of an aggrieved person in asserting the judge erred in refusing to provide Frank with compensation, invoking s. 227(3)(m), which empowers the court to direct a company to compensate an aggrieved person.

[37] Read together with the preamble in s. 227(3), compensation may be awarded to an aggrieved person under paragraph (m) where the court considers it appropriate with a view to remedying or bringing an end to the matters complained of.

[38] Aggrieved person is not a defined term. While the appellants suggest a broad interpretation, it is well established that an oppression action may only be pursued in respect of wrongs that constitute oppressive conduct suffered by the shareholder *qua* shareholder. Further, the relief ordered should go no further than necessary to correct or rectify that conduct: *Dubois* at para. 113; *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, 2016 BCCA 258 at para. 54 [*CSA*].

[39] The question, then, is whether the judge made a reversible error in exercising her discretion by refusing to order compensation to Frank *qua*

shareholder for additional wages/salary and compound interest in light of her findings of oppressive conduct.

Compensation for termination

[40] There are cases where the dismissal of a shareholder from their employment with the company has been found to form part of the oppressive conduct and compensation has been ordered paid to the shareholder as an aggrieved person.

[41] The key case identified by the parties is *Naneff v. Con-Crete Holdings Ltd.*, [1993] O.J. No. 1756 (C.J. – Gen. Div.). There Justice Blair found the acts of oppression included the plaintiff's dismissal from his management position and the refusal to pay him any severance. A 50% shareholder in a family group of companies, the plaintiff was also an officer. Along with terminating his employment, he was removed as an officer and excluded from the day-to-day operations of the business. Observing that wrongful dismissal in and of itself is not a proper basis for an oppression remedy, Blair J. concluded that where the claimant's position as employee is "integrally intertwined with his interests as a shareholder, officer and director" and the dismissal is part of a pattern of conduct designed to exclude the complainant from any active role in the companies, the dismissal is properly considered as constituting oppression: at para. 113. The remedies granted included an order for payment of compensation to the plaintiff as an aggrieved person akin to damages for wrongful dismissal (appeal allowed but not on these issues: (1995) 23 O.R. (3d) 481 (O.N.C.A.)).

[42] In *Dubois*, this Court considered *Naneff* and another case where shareholders sought compensation based on their dismissal as employees, *Elliott v. Opticom Technologies Inc.*, 2005 BCSC 529. In *Elliott*, an agreement that resulted in issuing the shares was found to include an implied term that the investors would be given continued employment. The judge was satisfied they never would have been able to make the investment needed to become shareholders unless they became and were entitled to remain employees. Because their interests as shareholders and employees were inextricably bound together, their "impermissible" termination was held to be unfairly prejudicial to them as shareholders: at para. 67.

[43] The trial judge in *Dubois* found the appellant's expectation of continued employment was reasonable but he did not appear to consider whether that expectation was *qua* shareholder. On appeal, Justice Groberman determined there was no evidence from which the judge could have concluded the appellant had an expectation as a shareholder of continued employment. He also observed that both *Naneff* and *Elliott* involved companies that had been structured to tie employment closely to shareholdings, such that the right to be employed flowed from the status of being a shareholder.

[44] *Naneff* was also considered in *CSA*. Justice Newbury viewed it as illustrating where the applicant is able to show an entire course of oppressive conduct, "which includes another cause of action (in *Naneff*, wrongful dismissal), that cause may also be remedied under the oppression provision": at para. 54, emphasis in original.

Discussion

[45] In the Remedy Judgment, as I have said, the judge concluded that Frank brought the claim for 13 months salary/compensation *qua* employee not *qua* shareholder based on her finding that the monthly payments were limited to work done. Again, in the Oppression Judgement she found Frank and Tom were paid only for the work they performed as employees and not as stakeholders; no dividends were ever paid.

[46] The appellants assert that although Frank (and Tom) took their compensation as employees, that does not mean Frank's claim for compensation was *qua* employee and his reasonable expectations included that he would continue to get paid. Instead, he was terminated without authority, his compensation was unilaterally withheld, and he was shut out of the business, which made it impossible to work for pay.

[47] The respondents contend the judge did not find that Frank's reasonable expectations included continuing employment. Therefore, she was entitled to conclude that Frank was not owed any compensation as an aggrieved person because his reasonable expectations did not include the monthly payment of wages. They also emphasize the judge expressly recognized, at para. 89, that terminating Frank's employment was part of the conduct he asserted was

oppressive, but her findings of unfair treatment or oppressive conduct, at para. 93, did not include the termination.

[48] While this is true of her findings in para. 93 (1) through (4), as I have indicated, they are proceeded by the words “after considering all of the evidence, I agree with Frank’s assertions of unfair treatment and make the following findings”.

[49] If I were to read paras. 89 and 93 on their own, the judge’s findings of oppressive conduct would appear to include all of Frank’s assertions of oppressive conduct found at para. 89, as well as the specific findings in para. 93.

[50] But after making those findings, she discusses them. In doing so she highlights Frank’s exclusion from the business, the failure to provide him with financial information and Tom’s demonstrations of contempt toward Frank. There is no mention of Frank’s dismissal. Further, her discussion of the findings concludes with “the above enumerated conduct” are oppressive, in apparent reference to para. 93(1) through (4).

[51] Also, just prior to para. 89, the judge highlights a reference in *Walker* to “the termination of a minority shareholder’s employment [that] is inextricably interwoven with his position as an officer and director” as an example of oppressive conduct, demonstrating her awareness of the legal treatment of the issue. Then, para. 89 identifies the oppressive conduct that Frank asserted related to his termination, as terminating his employment as “co-director”. Not paying his monthly salary or wages is not included. Instead, para. 89 refers to not paying him “any benefits from the company—no share of the rent, no share of the income, no interest”.

[52] Interpreting the reasons contextually and functionally, then, I would agree with the respondents that the judge’s findings of oppressive conduct did not include Tom’s dismissal of Frank and failing to pay him more than 11 months’ salary.

[53] My interpretation also considers the judge’s acceptance of Frank’s asserted reasonable expectations. Framed broadly, they provided, with respect to his role in the business, he would be a 50% “partner” and share equally in the value of the company and the profits; and Tom would act in Frank’s best interests and “certainly not in a manner hurtful to him”. While the second expectation (and

para. 93(4)) could be read as encompassing not dismissing Frank, it has to be understood in the context of the fiduciary duty Tom owed to Cedar and the judge's treatment of the dismissal.

[54] Although the judge outlined the conflicting accounts of the circumstances that led to the dismissal, and appeared to take a dim view of Tom's other evidence regarding payments he said were made to Frank after he was dismissed, she did not make a finding about the dismissal itself. In other words, she did not find that Tom's conduct in dismissing Frank was either wrongful or justified. I bear in mind Newbury J.A.'s conclusion in *CSA* that a successful claim in wrongful dismissal as part of a pattern of oppressive conduct is required before it can be remedied.

[55] Finally, interpreting the judge's findings of oppressive conduct in the Oppression Judgment as not including Tom's dismissal of Frank aligns with her finding in the Remedy Judgment that Frank's claim for lost wages/salary was brought *qua* employee, and therefore accords with the presumption of correct application that must be preferred to interpretations that suggest error: *R. v. G.F.*, 2021 SCC 20 at para. 79, citing *R. v. C.L.Y.*, 2008 SCC 2 at paras. 10–12.

[56] Although not clearly advanced, I am not persuaded by any further argument that the judge erred in not ordering compensation for Frank's loss of control of the companies, separate from the loss of income. It does not appear that the judge was asked to order compensation on this basis. In any event, the appellants have failed to demonstrate any error, let alone a palpable and overriding error, in the judge's findings that Frank and Tom were paid only for their work as employees and Frank was employed to manage the manufacturing side of the business.

Compound interest

[57] This leaves the appellants' assertion the judge erred in refusing to award compounded pre-judgment as opposed to simple court ordered interest.

[58] Although no authority was provided in support of their position at the remedy hearing, the appellants now cite *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43.

[59] The case involved an action for breach of contract. The contract incorporated a loan agreement that included a compound interest rate, which the

trial judge found the respondent lenders had breached. He agreed with the appellant that it should be awarded the interest rate provided for in the loan agreement. The appellant had only intended to be an interim lender. Due to the respondent's breach, however, it became a long-term lender, which resulted in missing other investment opportunities. The appellant had also argued that awarding simple interest would result in a windfall for the respondent given it would lend the money it owed to the appellant to customers at its usual compound interest rates: at para. 12.

[60] The Ontario Court of Appeal affirmed the trial judgment except for the award of compound interest. Ruling the *COJA* did not provide statutory authority to grant compound interest, the appeal court held that authority was founded in the court's equitable jurisdiction, but equitable principles did not warrant damages at compound interest rates for a simple breach of contract: at para. 19.

[61] The Supreme Court of Canada disagreed, concluding the *COJA* provided statutory authority to award compound pre-judgment (and post-judgment) interest according to the common law power to award damages under contract law, in addition to compound post-judgment based on the equitable power to award compound interest. The Court restored the trial judge's order providing for pre-judgment and post-judgment compound interest at the rate specified in the loan agreement. Justice Major concluded that paying any lesser amount would fail to award the appellant the agreed-upon time value of its money.

[62] Explaining the approach to awarding compound interest, Major J. wrote:

> 55 An award of compound pre- and post-judgment interest will generally be limited to breach of contract cases where there is evidence that the parties agreed, knew, or should have know, that the money which is the subject of the dispute would bear compound interest as damages. It may be awarded as consequential damages in other cases but there would be the usual requirement of proving that damage component.

[63] Referring to *Bank of America*, the respondents argued the judge correctly exercised her discretion to award simple annual interest under the *COIA* because the Settlement Agreement did not include an interest provision, let alone compound interest, and there was no evidence indicating they knew or ought to have known that Frank was entitled to compound interest from the Valuation Date to the date of payment.

[64] But *Bank of America* also affirmed the equitable jurisdiction to award compound interest (albeit post-judgment under the *COJA*) and here the judge had a broad discretion to remedy oppressive conduct with an order for compensation under s. 227(3)(m).

[65] Very briefly, the appellants submitted the oppressive conduct included Tom's intentional delay, which deprived Frank of the ability to properly mitigate his losses by acquiring another business with the proceeds from the purchase of his interest. They also submitted that because interest rates were very low after the Valuation Date, the simple annual interest provided for in the *COIA* is not compensatory.

[66] Certainly, Tom's delay or "stalling" in paying out 578, as per the Settlement Agreement, was part of the oppressive conduct. But in dealing with pre-judgment interest the judge considered what had not yet been paid out, the value of Frank's shares, described as his "future entitlement" to the value of the shares as of the Valuation Date pursuant to the Settlement Agreement. The judge did not reach a conclusion about the reasons for the delay in deciding to award Frank simple annual pre-judgment interest. Instead, she determined: "[r]egardless of the reasons for the delay, he should not suffer a loss of interest from the date of his entitlement": at para. 18.

[67] The respondents make the point that Frank did not adduce evidence of investments foregone, loans taken, or financial losses resulting from not being paid. As the appellants themselves put it, Frank wanted the money to get on with his life. Although the judge found Frank and his wife cashed in RRSPs to pay living expenses, there was no evidence addressing how much was withdrawn, how the RRSPs had been invested, or potential related losses.

[68] In these circumstances, I do not accept the judge made a reversible error in exercising her discretion to compensate Frank by awarding simple annual instead of compound pre-judgment interest.

[69] I would not accede to the first and second grounds of appeal.

Issue three – accepting goodwill deduction

[70] The appellants argue Mr. Matte's share valuation should not have involved a deduction for goodwill and instead the shares should have been valued based on the value of the land, equipment, and the business, because the business remained in the hands of Tom with no prospect of imminent sale. The appellants also suggest that had it been sold as a going concern, Frank's entitlement would have been much higher.

[71] Again, Mr. Matte concluded the calculated goodwill for Cedar ranged from negative $1,371,000 to negative $1,114,000, and explained this suggested the company was not able to generate expected market rates of return from its operating assets and possible impairment of the operating assets. Mr. Matte also considered the appellants' assertions on this issue but did not change his opinion.

[72] In the appellants' written submissions at the remedy hearing, they asserted goodwill should not be deducted "in this circumstance" because the respondents would be retaining the goodwill of Cedar to the detriment of the appellants. They also proposed that half of the median goodwill should be awarded to them.

[73] As the respondents have highlighted, the appellants have not accounted for the negative value of the goodwill in the XPS report. It is not a matter of goodwill being deducted and Tom being left with something of value. Instead, the goodwill was being retained by the company to the detriment of Tom as the remaining shareholder, not to the detriment of the appellants. Simply put, on Mr. Matte's analysis the goodwill was a negative (intangible) asset, which reduced the value of the company.

[74] Nor have the appellants attempted to identify how the judge may have erred by accepting the approach taken in the XPS report. I agree with the respondents that the valuation of property and goodwill in a business requires specialized or expert opinion evidence: see *Stolba v. Comwave*, 2019 BCCA 120 at para. 40. There was no contrary expert opinion evidence for the judge to consider.

[75] I see no merit in this ground of appeal.

Issue four – selecting the valuation's midpoint

[76] As with issue three, the appellants did not articulate how the judge allegedly erred in accepting the mid-point instead of the high end of the range in valuing the shares. Instead, they argued the shares should be valued at the high end because the mid-point reflects the "goodwill deduction" rather than the reality of the value of the business, thereby allowing Tom to retain all the benefit of the goodwill, and in recognition of Tom's oppressive conduct, namely his deliberate delay to "line his own pockets". Addressing this last circumstance, the appellants suggested the court can consider "who caused the problem" in deciding on the value of the shares.

[77] The judge accepted Mr. Matte's advice regarding the range in the *en bloc* fair market share values in the XPS report, citing his explanation of the value range given for Holdings:

> 1. The low value ($3.49 million) reflects the price an arm's length purchaser would pay for the shares if the respondents were intending to immediately dispose of Wescon's assets (primarily the Polkey Road property). In such a disposition, the respondents would incur disposition costs and taxes of about $454,000;
> 2. The high value ($3.74 million) reflects the purchase price an arm's length purchaser would pay for the shares, if the respondents never planned to sell the property. In such a case, the respondents would not incur any related disposition costs or corporate capital gains tax;
> 3. Where there is uncertainty around the timing of the sale of the property (i.e. a sale of the property is likely to occur anywhere from one to 20 years from the valuation date of January 31, 2016), it is recommended that the midpoint be used ($3.61 million).

[78] In deciding where along the range the shares should be valued, the judge found the potential sale of the assets in the next 14 years was uncertain in the absence of information about Tom's future plans or the future of the company. She also considered Tom's age, and the negative effect of interest rates and inflation on the business. Valuing the shares at the mid-point value then accorded with Mr. Matte's recommendation about when to use the mid-point.

[79] Frank has not alleged the judge misinterpreted or misunderstood the evidence in making the findings that underlie her acceptance of Mr. Matte's recommendation.

[80] Nor has Frank provided any authority for his proposition that the exercise of business valuation can engage “creative compensation” to support the highest valuation due to Tom’s oppressive conduct.

[81] It is that oppressive conduct that justified the remedy of requiring the company to purchase Frank’s shares under s. 227(3)(g). In my view, compensatory considerations are not relevant to determining the *fair market value* of the shares, which was the basis for quantifying the share purchase. Compensation is a separate remedy under s. 227(3)(m).

[82] I would not accede to this ground of appeal.

Disposition

[83] I would dismiss the appeal.

“The Honourable Justice Fleming”

I AGREE:

“The Honourable Mr. Justice Groberman”

I AGREE:

“The Honourable Mr. Justice Grauer”