In the Court of Appeal of Alberta

Citation: Styles v Alberta Investment Management Corporation, 2017 ABCA 1

Date: 20170104
Docket: 1503-0275-AC
Registry: Edmonton

2017 ABCA 1 (CanLII)

Between:

David Styles

Respondent
(Plaintiff)

\- and -

Alberta Investment Management Corporation

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment of the Honourable Mr. Justice Slatter and the Honourable Mr. Justice O'Ferrall

Memorandum of Judgment of the Honourable Mr. Justice Berger Concurring in the Result

Appeal from the Judgment by
The Honourable Madam Justice D.A. Yungwirth
Dated the 5th day of October, 2015
Filed on the 19th day of November, 2015
(2015 ABQB 621, Docket: 1303 11439)

Memorandum of Judgment

The Majority:

[1] The respondent was terminated from his employment "without cause", and the issue on this appeal is the compensation to which he is entitled. The more precise issue is whether he is entitled to bonuses under the appellant's detailed Long Term Incentive Plan.

Facts

[2] The respondent moved from Ontario to Alberta in 2010 to take up a position with the appellant as an investment manager. His employment was governed by a written employment contract which provided for a base salary plus potential bonuses. The respondent could potentially earn bonuses well in excess of his base salary under the Annual Incentive Plan or the Long Term Incentive Plan. It is his entitlement under the latter plan that is in issue.

[3] The contract acknowledged that the respondent could be terminated without cause and provided for a formula payment in that event: one month's salary per year of service, with a minimum of three months, and a maximum of six months. It is not alleged that there was "cause" justifying the respondent's dismissal in 2013, and no issue arises about the payment that is due in lieu of notice.

[4] The objectives of the Long Term Incentive Plan are outlined in the preamble to that Plan:

> The Long Term Incentive Plan is designed to motivate, recognize, reward and retain senior management and other key employees of AIMCo by providing a performance oriented long-term incentive that will reinforce alignment of client and employee interests, and will enhance AIMCo's ability to attract and retain key talent.
>
> The objectives of the Long Term Incentive Plan are to recognize sustained performance, minimize the risk of paying for transitory performance, evaluate investment performance over a longer performance cycle and focus employees on long term strategies and objectives.

The way the Long Term Incentive Plan operated was set out in detail in a 19 page document incorporated into the respondent's contract of employment.

[5] While the Annual Incentive Plan generated bonuses that were earned and payable in each year, the Long Term Incentive Plan was more complex:

2017 ABCA 1 (CanLII)

2017 ABCA 1 (CanLII)

(a) Each year the participating employees would be given a "grant" expressed in dollars. This was not a "grant" in the usual sense of the word, because it was not actually paid and never became payable as such. It was more an "allocation" or "base calculation" that would eventually be used in the bonus formula.

(b) The Plan was designed to measure long-term performance of the investments, not short-term performance, and so was designed to generate bonuses on a four-year, overlapping cycle. While one could say that the respondent "earned" the annual "grants", that only meant that he was entitled to have these amounts (as adjusted) carried forward and entered into the bonus formula at the end of the four year cycle.

(c) Under the formula in the Plan, the "grant" or allocation for any year would be adjusted up or down in the future three years. Any "grant" would be adjusted based on the "Compound Total Rate of Return of the Total Fund and a Performance Factor (determined by weighing the performance of both the Total Fund in the Asset Class, if applicable)".

(d) At the end of each four year cycle the participant's bonus would be calculated based on the previous four annual "grants" or allocations, as they were adjusted under the formula.

It follows that no bonus became payable under the Long Term Incentive Plan for at least four years. It was only at that time that the adjusted value of the annual "grants" could be calculated and the bonus formula applied. In effect, no rights under the Plan vest for four years, and a participant whose employment lasted less than four years would never receive a bonus.

[6] For the purposes of this appeal, the key provision in the Long Term Incentive Plan is that in order to be eligible for a bonus the participant had to be an active employee of the appellant on the vesting date. While the wording of the Plan varied slightly from year to year, the wording of the 2011 Plan is representative:

> *Eligibility for Participation and Payment*:
>
> When a Participant is awarded a grant, the Participant will be required to sign a Participation Agreement (Appendix B) to activate the grant. The terms and conditions of the Participation Agreement are deemed to be part of the Long Term Incentive Plan and if not signed and delivered to Human Resources within the designated period, the grant is forfeited.
>
> *Eligibility for Payment*:
>
> Unless otherwise stipulated, participants must be actively employed by AIMCo, without regard to whether the Participant is receiving, or will receive, any compensatory payments or salary in lieu of notice of termination on the date of payout, in order to be eligible to receive any payment.

> As per the guidelines above, entitlement to an LTIP grant, vested or unvested, may be forfeited upon the Date of Termination of Active Employment without regard to whether the participant is receiving, or will receive, any compensatory payment or salary in lieu of notice of termination.
>
> “Date of Termination of Active Employment” means the termination date specified by AIMCo in the termination notice. (emphasis added)

2017 ABCA 1 (CanLII)

The contract therefore left no doubt as to whether the participant had to be actively employed on the vesting date. It also left no doubt that any period of “reasonable notice” required in lieu of notice of termination did not qualify as “active employment”. This is not a case where the court has to imply terms in an agreement, fill in gaps, or interpret vague provisions.

[7] The Participation Agreement that accompanied the Plan echoed these requirements:

> *c) Forfeiture of the Grant*: The Participant acknowledges that he or she has read and understands the forfeiture provisions of the Plan. . . .
>
> *k) No Damages Recoverable by the Participant*: In the event that the Participant is terminated by the Employer either with or without cause, and with or without reasonable notice, the Participant shall have no rights to any particular grants which have been made to him or her other than as set forth in the Plan or other separate written agreement with the Participant, and the Participant will not be entitled to recover damages nor to be paid any benefits or to recover any compensation which the Participant would or may otherwise have been entitled to under the Plan if the Participant had remained actively employed by the Employer. . . .
>
> *o) Arrangement Constitutes Complete Agreement*: The Plan document and this Participation Agreement represent the entire agreement between the Participant and the Employer with respect to any and all matters described in it. Neither the Participant nor the Employer relies upon or regards as material, any representations or any writing that has not been incorporated into the Plan or the Participation Agreement or made part of the Plan or Participation Agreement. (emphasis added)

There was some uncertainty as to whether the respondent signed the Participation Agreement, which was a precondition to the entitlement to bonuses. The trial judge proceeded on the assumption that the agreement had been signed. In any event, if the respondent did not sign the agreement he cannot be in a better position than if he did.

[8] The respondent was employed between 2010 and 2013, that is, less than four years. It is clear that the respondent was not actively employed on the date that the bonuses might have

vested, and it therefore appeared he was not entitled to receive bonuses. The trial court found, however, that the bonuses were payable: ***Styles v Alberta Investment Management Corp.***, 2015 ABQB 621, [2016] 4 WWR 593.

2017 ABCA 1 (CanLII)

[9] The trial reasons start from the decision in ***Bhasin v Hrynew***, 2014 SCC 71, [2014] 3 SCR 494, which recognized a general requirement of honesty in the performance of contracts as a "general organizing principle" of the law of contract. This concept was expanded by the trial court to include a related "general organizing principle" described as "a common law duty of reasonable exercise of discretionary contractual powers".

[10] The reasons then analyze the terms of the Long Term Incentive Plan, noting that the 2011 version of the Plan provided that grants "may be forfeited" if the participant was not actively employed on the vesting date. This wording did not appear in previous versions. The reasons (at para. 108) interpret these words as giving a discretion to the appellant: grants are not automatically forfeited if the participant is not actively employed on the vesting date, but "may be" forfeited in the discretion of the employer. Under the "common law duty of reasonable exercise of discretionary contractual powers", this discretion had to be exercised "fairly and reasonably". The ***Bhasin*** organizing principle of "good faith and honesty" evolved into a duty of "reasonableness", and then into a duty of "fairness and reasonableness" (at paras. 63, 110, 116).

[11] The trial judge then concluded that the provisions of the contractual arrangements were "from a commercial perspective . . . inherently contradictory". The employment contract recognized the common law right to terminate the contract without cause, but then provided that bonuses would not be earned if they had not vested during active employment. Where the objective was to attract key talent, and the method used was performance based compensation, it was inconsistent to restrict the eligibility to earn bonuses in this way.

[12] It followed from this line of analysis that the discretion to forfeit "grants" underlying bonuses that had not vested was contrary to the reasonable expectations of the parties, notwithstanding the plain wording of the contract. The whole agreement clause did not change that, because the parties could not contract out of the "common law duty of reasonable exercise of discretionary contractual powers". The respondent could assert expectations and "interests" notwithstanding the terms of the contract to which he had agreed.

[13] The reasons at para. 115 confirm that there was "no evidence that the termination in this case was done in bad faith". Specifically, the respondent had produced no evidence that his termination was related to his entitlement to bonuses. "Cause" was not alleged, but the appellant had "provided no evidence as to the reasons for termination and no reasonable explanation for the associated or consequential denial of the LTIP grants". It was "not fair" to take advantage of the employee's hard work, and then terminate the employee where the consequence would be an ineligibility for the bonuses. This conduct failed to meet the "minimum standard of honesty" required in ***Bhasin***.

2017 ABCA 1 (CanLII)

[14] In the end, "the employer's actions have created circumstances under which the employee is unable to receive his LTIP grants". In other words, since it was the actions of the employer in terminating the employment that prevented the respondent from being "continuously employed" until his bonuses vested, the respondent was entitled to his bonuses notwithstanding the terms of the Plan. Even though the contract expressly provided (in six places) that termination without cause would result in a loss of eligibility for bonuses, if the employer did actually terminate without cause the bonuses would still be payable, unless the employer could justify the termination. This was said to be responsive to the "power imbalance" in the relationship.

[15] The respondent's damages were calculated as if the appellant had not exercised its discretion to cancel his grants when his employment terminated. Since the four year cycle on which the bonuses were calculated had not expired, the trial judge had to estimate the value of the bonuses applying positive and negative contingencies, including "taking judicial notice of the fluctuating global economy". The respondent was awarded damages for lost bonuses of $444,205.

Issues and Standard of Review

[16] The appellant raises a number of overlapping issues. The background issue is whether the trial judge erred in determining that there is a "common law duty of reasonable exercise of discretionary contractual power". The more focussed issue is whether the trial judge erred in awarding the respondent bonuses, notwithstanding the terms of the Long Term Incentive Plan.

[17] The standards of review are summarized in ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235:

(a) conclusions on issues of law are reviewed for correctness: ***Housen*** para. 8,

(b) findings of fact, including inferences drawn from the facts are reviewed for palpable and overriding error: ***Housen*** paras. 10, 23; ***H.L. v Canada (Attorney General)***, 2005 SCC 25 at para. 74, [2005] 1 SCR 401, and

(c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity": ***Housen*** paras. 28, 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: ***Housen*** paras. 33, 36.

On this appeal the facts are not in dispute. The appeal primarily raises issues of law.

[18] The existence and the scope of "a common law duty of reasonable exercise of discretionary contractual powers" is a question of law reviewed for correctness.

2017 ABCA 1 (CanLII)

[19] The interpretation of contracts can raise issues of both fact and law. The background circumstances of a contract, and the intentions of the parties, are relevant to the interpretation of contracts. When there are live issues in that respect, the interpretation of the contract is a mixed question of fact and law ". . . as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": ***Sattva Capital Corp. v Creston Moly Corp.***, 2014 SCC 53 at para. 50, [2014] 2 SCR 633. There are a number of exceptions to the ***Sattva*** concept, such as ". . . the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": ***Sattva*** at paras. 53-5. An exception exists, however, for standard form contracts and standard form contractual wording where "there is no meaningful factual matrix that is specific to the parties to assist the interpretation process". In such cases the precedential value of the decision overrides. Such contracts cannot have one interpretation in one situation, and another in the next. As a result, the standard of review of standard form wording is correctness: ***Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.***, 2016 SCC 37 at paras. 24, 46-8, [2016] 10 WWR 419.

[20] The Long Term Incentive Plan is a "standard form" contractual document. It applies to a number of employees, and must have the same meaning for all. These litigants did not separately negotiate it, and it does not reflect their subjective "intention" other than on a conceptual basis. It is governed by the ***Ledcor*** principles, and its interpretation is reviewed for correctness.

[21] No standard of review is engaged with respect to the three issues on which the trial judge expressed no views: relief from forfeiture, the effect of employment standards legislation, and unconscionability.

Interpretation of the Contract

[22] On a plain reading of the Long Term Incentive Plan the outcome seems obvious:

(a) bonuses are only paid when they vest under the four year cycle,

(b) the contract makes it clear that in order to be eligible a participant must be actively employed on the vesting date,

(c) the contract is also clear that "actively employed" does not include a period of notice or payment in lieu of notice generated by termination without cause, and

(d) the respondent did not qualify, as he was terminated after three years of employment, before any four year bonus cycle was completed (whether or not one includes the "notice period" provided for in the contract).

Simply reading the contract, the action should have been dismissed. The respondent has to show some basis on which he is entitled to the bonuses notwithstanding the plain wording of the contract.

2017 ABCA 1 (CanLII)

[23] The only basis on which the respondent can succeed is if he can show that, in law, the appellant cannot rely on the plain wording of the Long Term Incentive Plan. The reasons under appeal found that the respondent was entitled to the bonuses, notwithstanding his failure to comply with the black letter terms of the contract, because of the application of the "common law duty of reasonable exercise of discretionary contractual powers". The trial reasons identify two discretionary decisions that had to be justified under this test: (a) the discretionary decision to deny the respondent the benefits of the "grants" he had received even though he was not actively employed on the vesting date, and (b) the discretionary decision to terminate the respondent without cause.

The Discretion to Deny Grants

[24] The first issue is whether there was in fact a "discretion" involved in denying the respondent credit for "grants" when his employment ended before the vesting date. This line of analysis relies on the three words "may be forfeited" found in the 2011 Plan:

> As per the guidelines above, entitlement to an LTIP grant, vested or unvested, may be forfeited upon the Date of Termination of Active Employment . . .

That proviso appears for the first time in the 2011 Plan. It is not echoed in the Participation Agreement. Prior versions of the Plan merely stated that continued employment was a precondition to eligibility for bonuses.

[25] On the correct interpretation of the Plan and the Participation Agreement as a whole the word "may" was not intended to introduce an element of discretion. First of all, the Plan is a lengthy and detailed document, which attempts to deal directly with any possible contingency. The "guidelines above" in fact deal with 11 specific scenarios, from "new hire" to "death". A number of them relate to termination of employment for various reasons. The expression "may be forfeited" merely refers back to some of these 11 scenarios where forfeiture of grants could occur.

[26] Where the Plan purported to create a discretion, it did so explicitly. For example, under the scenario "voluntary resignation" it provides: "Exceptions can be made at the discretion of the Chief Executive Officer". Under the scenario "approved leave of absence" it states "Special LTIP Grants may be awarded upon return to work at the discretion of the Chief Executive Officer". The phrase "may be forfeited" would be an anomalous way of including an implied discretion in the Plan.

[27] Read as a whole, the terms of the Plan and the Participation Agreement make it clear that continued employment on the vesting date is a condition precedent to entitlement. As the appellant pointed out, the documents say so in no less than six places. The Plan states under the scenario "termination without cause" that "All vested grants are forfeited as of the Date of Termination of Active Employment . . .". The Participation Agreement states that a participant "shall have no rights to any particular grants" unless he is employed on the vesting date. This

wording is inconsistent with any discretion being involved. It is unreasonable to suggest that the three words "may be forfeited" override all of the other wording in the Plan and the Participation Agreement that emphatically state that bonuses are forfeited when employment terminates.

2017 ABCA 1 (CanLII)

[28] In context the word "may" merely indicates that upon certain events the right to a bonus will be lost, notwithstanding the initial allocation of a "grant". It operates as a warning or caution, using the predictive meaning of "may" as "expressing possibility", rather than signalling discretion. In this context "may" essentially means "might", as in: "If you run out onto the freeway you may get run over".

[29] A contracting party can, of course, always waive its entitlement to performance. The appellant might have decided not to insist on the strict written terms of the Plan, but such a waiver or abdication of rights exists outside the contract, and is not a "discretion" in performance granted by the contract. "Giving up rights" is not properly described as a "discretion", much less one that can be reviewed by the court; the court cannot require one party to give up its contractual rights under the guise of regulating the exercise of discretion: ***Bhasin*** at para. 73. Since he was not continuously employed on the vesting date, the respondent was not entitled to bonuses, and the refusal of the appellant to pay him one anyway was not in any sense "discretionary".

[30] Properly interpreted, there was no right to receive a bonus unless the respondent was actively employed on the vesting date. There was no discretion involved. Whatever the test for review by the courts of the exercise of contractual discretions, there was in fact no discretion here to be exercised.

Termination of Employment Contracts

[31] The second discretion found to be involved was the "discretion" to terminate the respondent without cause. This decision was said to be subject to review under the "common law duty of reasonable exercise of discretionary contractual powers". The respondent's job performance had always been satisfactory or better, and since no acceptable reason had been given for the dismissal, the trial judge found that certain consequences followed.

[32] The particular reasons for the termination were not explored during the trial or disclosed on the record, although it was agreed that the respondent was not terminated "for cause". The respondent argued that since the appellant could not show any basis on which it could reasonably exercise its "discretion" to terminate his contract (and incidentally make him ineligible for bonuses) it followed that the appellant could not deny him those bonuses, even though the "grants" had not vested. In other words, the "reasonableness" of the exercise of the asserted discretion depended on the employer showing some justifiable reason for termination of the employment.

2017 ABCA 1 (CanLII)

[33] The common law implies a term that all employment contracts can be terminated on reasonable notice by either side. If the termination is "for cause" no notice is required. If the termination is "for less than cause", and reasonable notice is not given, then compensation in lieu of notice must be paid. There is a subsidiary principle that the termination must not be disrespectful, unfair or insensitive, failing which additional damages might be paid: ***Wallace v United Grain Growers Ltd.***, [1997] 3 SCR 701 at paras. 98, 109.

[34] It is important to remember that termination without cause does not involve a breach of the contract: ***Merrill Lynch Canada Inc. v Soost***, 2010 ABCA 251 at para. 9, 31 Alta LR (5th) 201, 487 AR 389, leave to appeal refused [2011] 1 SCR x. Employment contracts are not perpetual agreements, so termination cannot be a breach. The right to terminate on reasonable notice is one of the implied terms of the agreement, and exercising that right is performance of the agreement, not a breach. The common law implies a term of reasonable notice, or pay in lieu, in those circumstances. The payment in lieu is not "damages" for a breach of the contract, but rather one component of the compensation provided for in the contract. If an employer fails to give proper notice or pay in lieu, the breach is in the failure to pay, not in the termination.[1]

[35] The common law does not recognize "near cause" for termination of employment contracts: ***Dowling v Halifax (City)***, [1998] 1 SCR 22. If there is not "cause" in the technical meaning of the term, then notice or compensation in lieu of notice must be given or paid. "Cause justifying termination" is a strict standard, and there are many legitimate, reasonable, or at least understandable reasons why an employer might terminate an employment contract that the law does not recognize as amounting to "cause". An absence of "cause" does not mean that the termination was capricious, arbitrary, dishonest, unreasonable or insensitive, as there is a large range of decisions between those concepts. Further, one corollary of the right of an employer to terminate without cause is that the employer need not justify or explain the termination. Neither the employer nor the employee need concern themselves with any "near cause" in between "cause" and "no cause": ***Merrill Lynch*** at paras. 10-12.

[36] ***Wallace*** rejected the argument that it was an implied term of employment contracts that the employee would "not be fired except for cause or legitimate business reasons":

> 76 A requirement of "good faith" reasons for dismissal would, in effect, contravene these principles and deprive employers of the ability to determine the composition of their workforce. In the context of the accepted theories on the employment relationship, such a law would, in my opinion, be overly intrusive and inconsistent with established principles of employment law, and more

[1] There are decisions from other jurisdictions that treat termination as a breach, but they do not reflect the law of Alberta: see for example ***Paquette v TeraGo Networks Inc.***, 2016 ONCA 618 at para. 16, 28 CCPB (2d) 1. ***Paquette*** relies on the *dictum* in ***Sylvester v British Columbia***, [1997] 2 SCR 315 at para. 1, but para. 15 of that decision confirms that it is the non-payment that is the breach, not the termination itself.

> appropriately, should be left to legislative enactment rather than judicial pronouncement.

Bhasin at para. 54 confirmed this passage of ***Wallace***, stating that good faith does not ". . . extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce". If the employer does not have to show "good faith reasons for dismissal", it follows that the employer does not have to give reasons for the dismissal. That would contradict the very concept of being allowed to terminate the relationship upon reasonable notice or compensation in lieu thereof, without further explanation. It would treat termination "without reasonable explanation" as a breach of the contract. If the employer does not have to explain the decision, the court has no mandate to examine the basis or reasonableness of the reasons for termination.

[37] Reasons are not needed for termination without cause, not because the employer does not have reasons, but simply because fundamental incompatibility between the employee and the employer, or the work, or other employees, is difficult to express in words. As ***Wallace*** points out, the employer has a fundamental right to determine the composition of the workforce. Parties rarely attempt to expressly contract for the right to act "unreasonably". When broadly framed rights are given in a contract, it is generally because one of the parties does not want to get into the "good reason, bad reason" debate at all: ***Alberta v Alberta Union of Provincial Employees (Davis Grievance)***, 2008 ABCA 258 at para. 42, 96 Alta LR (4th) 207, 433 AR 159.

[38] The trial reasons approach the problem from the wrong direction. They first analyze (starting at para. 89) what are described as the "legitimate contractual interests of the Plaintiff" in the Long Term Incentive Plan. After establishing those expectations, they then conclude at para. 103:

> 103 Accordingly, these legitimate contractual interests of the Plaintiff are the rights to which the employer should have had appropriate regard when exercising its discretion to terminate without cause.

This conclusion assumes that when an employer proposes to terminate employment without cause, it must have a reason that includes "an appropriate regard" for the employee's expectations, beyond what the contract actually provides for. This approach assumes that there is a concept of "near cause" which examines whether the employer's motivation for termination is justifiable in some way, short of "cause". An "unreasonable" termination changes an ordinary "termination without cause" from the exercise of an implied term of the contract into a breach of the contract, entitling the respondent to damages. This is inconsistent with the right to terminate without cause on payment in lieu of notice, without providing any reason. The rule is not that there can be termination without cause so long as there is payment in lieu of notice, plus compensation for "legitimate contractual expectations".

[39] The reasons at para. 115 state that "the employer has provided no evidence as to the reasons for termination and no reasonable explanation for the associated or consequential

2017 ABCA 1 (CanLII)

2017 ABCA 1 (CanLII)

denial of the LTIP grants". This approach reverses the burden of proof; if the respondent thought there was anything improper about his termination, or that it had any connection to his bonuses, the onus was on him to prove it. As just explained, an employer does not have to provide some reasonable justification for the termination without cause, in the absence of which the employee is entitled to additional compensation calculated as if the contract was never terminated. The latter point in para. 115 is also easily answered: the explanation for the denial of bonuses on termination is because the Plan requires active employment on the vesting date. No employment, no vesting, no bonus.

[40] As noted, the Long Term Incentive Plan provides in six places that the employee must be actively employed on the day the bonuses vest. Without continuing employment on the vesting date, the participant will have "no rights to any particular grants" and "will not be entitled to recover damages nor to be paid any benefits or to recover any compensation". The argument that the employer can only divest bonuses when termination is "reasonable" assumes that divesting could only occur if there was some valid reason for the termination of employment (cause, near-cause, or perhaps circumstances beyond the control of the employer). That analysis is not only inconsistent with the plain wording of the Plan, it is inconsistent with the very concept of "termination without cause".

[41] In summary, it is inaccurate to describe the decision to terminate without cause as a "discretion": ***Bhasin*** at para. 72. It is a further error to suggest that such a decision can be reviewed by the court for reasonableness. This approach treats termination without cause as a breach of contract. An employer can terminate the contract of employment on reasonable notice - no explanation need be given. The employee is entitled to notice or pay in lieu of notice and any other compensation provided for in the written employment contract. In this case the respondent was not entitled to any unvested bonuses on termination. There is no common law principle that he would nevertheless be entitled to bonuses unless a reasonable basis for the termination was shown.

Principles of Contractual Performance

[42] To summarize to this point, neither of the reasons given for awarding the respondent a bonus can be sustained. The Long Term Incentive Plan did not include any discretion to pay a bonus even if the respondent was not continuously employed on the vesting date. A decision to terminate an employment contract without cause is not properly characterized as a "discretion", and an employer is not required to provide a reasonable basis for termination without cause, failing which the termination without cause is treated as a breach of the contract.

[43] The trial reasons found a basis for liability notwithstanding the plain wording of the Plan, arising from a "common law duty of reasonable exercise of discretionary contractual power". The decision under appeal was driven by the contention that such an organizing principle exists as an extension of the ***Bhasin*** decision, and could be used by the court to review the two discretions said to exist.

[44] The appropriate starting point is an analysis of what ***Bhasin*** actually says. ***Bhasin*** considered two related arguments by the appellant: should there be a "general duty of good faith in contract", or should there, at the very least, be a "duty of honest performance of contractual obligations"? The Court distinguished them as follows:

(a) [The appellant's] ". . . broad submission is that the Court should recognize a general duty of good faith in contract. The duty arises where the agreement gives the defendant the power to unilaterally defeat a legitimate contractual objective of the plaintiff and it does not clearly allow the defendant to exercise its power without regard for that objective . . . This duty of good faith prevents conduct which, while consonant with the letter of a contract, exhibits dishonesty, ill will, improper motive or similar departures from reasonable business expectations." (para. 29)

(b) [The appellant's second position] is that the Court should at least recognize a duty of honest performance of contractual obligations". (para. 30)

The Court recognized the first proposition as a "general organizing principle of the common law of contract" which underlies a number of specific situations where the law already recognizes an obligation of good faith: ***Bhasin*** at para. 33. In other words, the first proposition was not a "stand-alone" concept, but rather explained other more specific rules that were applied in specific, established situations.

[45] Applying the "organizing principle of good faith" involves a difficult balancing exercise. Contracting parties are generally entitled to perform (and expect performance of) the contract in accordance with its terms. They are entitled to act in their own best interests: ***Bhasin*** at para. 70. But at some point they cannot perform certain contracts in a way that seeks to "undermine [legitimate contractual] interests in bad faith": ***Bhasin*** at para. 65. The danger lies in imposing "legitimate contractual interests" that are contrary to the plain wording of the contract, or that involve the imposition of subjective expectations and interpretations on the contract. As a result, this "organizing principle" should only be applied to situations where it has previously been invoked, although there is a limited ability to extend the law: ***Bhasin*** at paras. 71, 93.

[46] One of the previously identified areas where the Court found a manifestation of the "organizing principle" of good faith was employment law, but only with respect to the "manner of termination". The general duty of good faith in contract law did not ". . . extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce": ***Bhasin*** at para. 54.

[47] On the other hand, the Court did recognize the second proposed "common law duty . . . to act honestly in the performance of contractual obligations": ***Bhasin*** at paras. 33, 62, 66, 71, 93; J. T. Robertson, *Good Faith As an Organizing Principle in Contract Law* (2015), 93 Can Bar Rev 809 at p. 815. But this new duty simply meant that ". . . parties must not lie or otherwise

2017 ABCA 1 (CanLII)

knowingly mislead each other about matters directly linked to the performance of the contract": ***Bhasin*** at para. 73. This is a very narrow concept, which does not create any duty of loyalty, disclosure, or forgoing of contractual advantages: ***Bhasin*** at paras. 73, 86.

2017 ABCA 1 (CanLII)

[48] The trial reasons formulated the "common law duty of reasonable exercise of discretionary contractual power" by beginning with an analysis of the "minimum standard of honest contractual performance" established in ***Bhasin***. This duty requires only that the contracting parties will not lie to each other, knowingly mislead each other with respect to performance of the contract, or act dishonestly (reasons at paras. 51-6).

[49] The analysis then purported to build on ***Bhasin***, reasoning that capricious or arbitrary exercise of discretionary powers in a contract amounted to dishonesty or bad faith within the ***Bhasin*** principle. This analysis resulted in the recognition of a general principle that "discretionary powers granted under a contract must be exercised fairly and reasonably":

> 63 Based on my review of the existing jurisprudence, especially the legal principles outlined in the preceding paragraphs, it is reasonable to recognize as a manifestation of the general organizing principle of good faith, a common law duty which requires that discretionary powers granted under a contract must be exercised fairly and reasonably and not in a manner that is "capricious" or "arbitrary." In this sense, the duty is not conceived or "thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard" of reasonable exercise of discretionary contractual power: see, *Bhasin* at para 74.
>
> 64 Accordingly, contracting parties would be unable to utilize an "entire agreement clause" to exclude or contract out of this common law duty of reasonable exercise of discretionary contractual powers, which exists under the broad umbrella of the organizing principle of good faith performance of contracts in a manner analogous to the duty of honest performance.

Bhasin does not establish any general principle of "reasonable exercise of discretion" in contractual performance. This radical extension of the law is unsupported by authority, and contrary to the principles of the law of contract.

[50] The overall problem with the analysis in the trial reasons is that it quotes from several parts of the judgment in ***Bhasin*** without distinction. In some places the trial reasons rely on statements in ***Bhasin*** about the general "good faith" obligation, which was rejected by the Supreme Court as a universal principle, and identified as one that only manifests itself in certain discrete situations. Termination of employment is not one of those situations. Secondly, the trial reasons take the "honest performance" principle that was established in ***Bhasin***, and then extend it not only well beyond the rejected "good faith" principle, but into a much broader and more problematic "common law duty of reasonable exercise of discretionary contractual power".

2017 ABCA 1 (CanLII)

[51] Firstly, the ***Bhasin*** principle relates to the performance of the contract. It does not relate to the negotiation or terms of the contract. ***Bhasin*** does not invite the court to examine the terms of the contract and decide if they are "honest", "capricious", or negotiated in "good faith", much less whether they are "fair and reasonable". The courts have never concerned themselves with the relative value of the consideration exchanged in a contract: ***Regehr v Ketzakey Silver Mines Ltd.*** (1970), 10 DLR (3d) 171 at para. 23 (Alta SC, App Div). Unless a contract is unconscionable or contrary to public policy, it is to be enforced in accordance with its terms. ***Bhasin*** did not open up for examination whether the terms of the Long Term Incentive Plan requiring continuous employment on the vesting date were "fair" or "reasonable".

[52] Secondly, ***Bhasin*** does not make it dishonest, in bad faith, nor arbitrary to require that the other party perform the contract in accordance with its terms. If the contract clearly says that an employee must be employed on the vesting date to earn a bonus, it is not dishonest to insist that the employee is actually employed on the vesting date. The employment contract required payment of a bonus only if the preconditions were met. If the preconditions were not in fact met, the failure to pay the bonus cannot be described in any sense as being "dishonest". Declining to perform contractual covenants and promises that were never given is entirely reasonable. Refusing to pay a bonus that is not payable is not dishonest.

[53] As ***Bhasin*** itself notes, even the organizing principle of good faith (when it applies) must not ". . . veer into a form of *ad hoc* judicial moralism or 'palm tree' justice":

> 70 The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another -- even intentionally -- in the legitimate pursuit of economic self-interest: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

Bhasin does not invite judicial examination of the rights granted by contracts to determine if they are "fair", or whether the consequences of performance are more or less advantageous to either party than that party might have hoped or desired.

[54] As it was aptly put in ***Addison Chevrolet Buick GMC Limited v General Motors of Canada Limited***, 2015 ONSC 3404 at para. 119, 45 BLR (5th) 135:

> The duty of good faith performance of contractual obligations recently affirmed by the Supreme Court of Canada in *Bhasin* [is not a licence] to invent obligations out of whole cloth divorced from the actual terms of the contract between the parties.

The asserted organizing principle of a "common law duty of reasonable exercise of discretionary contractual power" is not only unsupported by ***Bhasin***, it is inconsistent with it. ***Bhasin*** is not to be used as a tool to rewrite contracts, and award damages to contracting parties that the court regards as being "fair", even though they are clearly unearned under the contract. The respondent contracted for Long Term Incentive Plan bonuses that would only vest if he stayed employed for at least four years, and nothing in ***Bhasin*** entitles him to anything more. The respondent did not earn the bonuses he claims, and he is not entitled to them.

[55] As was said in ***Union Eagle Ltd. v Golden Achievement Ltd.***, [1997] AC 514 at p. 518-9 (PC):

> The notion that the court's jurisdiction to grant relief is "unlimited and unfettered" (*per* Lord Simon of Glaisdale in *Shiloh Spinners Ltd. v. Harding* [1973] A.C. 691, 726) was rejected as a "beguiling heresy" by the House of Lords in *Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana,* [1983] 2 A.C. 694, 700 (*The Scaptrade).* It is worth pausing to notice why it continues to beguile and why it is a heresy. It has the obvious merit of allowing the court to impose what it considers to be a fair solution in the individual case. The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority (see *per* Lord Radcliffe in *Campbell Discount Co. Ltd. v. Bridge* [1962] A.C. 600, 626) but also upon practical considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be "unconscionable" is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic . . .

The proposed "common law duty of reasonable exercise of discretionary contractual power" is an equally beguiling heresy that should be firmly rejected. If ***Data & Scientific Inc. v Oracle Corp.***, 2015 ONSC 4178, 127 OR (3d) 149 says otherwise it does not reflect the law of Alberta.

[56] Expanding the principle of good faith performance of contracts found in ***Bhasin*** into a principle of "reasonable" performance creates a clear danger of "reverse engineering" in

2017 ABCA 1 (CanLII)

reviewing the performance of contracts. If the court cannot identify what it considers to be a reasonable basis for the exercise of contractual rights, then it is presumed that there must have been arbitrariness, capriciousness or "bad faith" involved: ***Alberta v Alberta Union of Provincial Employees (Davis Grievance)*** at paras. 42-4. The important distinction between exercises of discretion and dishonest performance eventually disappears.

2017 ABCA 1 (CanLII)

[57] Further, a contractual discretion can be exercised giving primacy to the best interests of the party exercising the discretion. Acting in one's self-interest in a commercial contractual context is neither dishonest, capricious, nor arbitrary. ***Bhasin*** at para. 70 recognizes the ". . . freedom of contracting parties to pursue their individual self-interest". Even the principle of basic good faith in contractual performance does not require subordination to the other party's interest. Any assertion of an obligation to exercise contractual performance discretions "reasonably" or "fairly" goes even further.

[58] The trial reasons recognize that ***Bhasin*** does not support this new "common law duty of reasonable exercise of discretionary contractual power", stating rather that it was a reasonable "manifestation of the general organizing [***Bhasin***] principle". The concept, however, appears to assume that there is no room between capricious, arbitrary, and dishonest exercise of performance and "reasonableness". The very concept of "discretion" presupposes that there is a wide range of possible methods of performance permitted by the contract. A contracting party is entitled to pick any one, and indeed is entitled to pick the least onerous one: ***Bhasin*** at para. 90; ***Hamilton v Open Window Bakery Ltd.***, 2004 SCC 9 at paras. 15-8, [2004] 1 SCR 303; ***Agribrands Purina Canada Inc. v Kasamekas***, 2011 ONCA 460 at paras. 47-50, 106 OR (3d) 427.

[59] The concepts of "dishonesty, arbitrariness, and capriciousness" on the one hand, and "unreasonableness" on the other hand have distinct meanings in law: ***Partec Lavalin Inc. v Meyer***, 2001 ABCA 145 at para. 19, 94 Alta LR (3d) 250, 281 AR 339. As stated in A. Swan and J. Adamski, Canadian Contract Law, 3rd ed. (Markham, Ont.: LexisNexis, 2012) at para. 8.135: ". . . the obligation to behave in good faith imports quite a different kind of obligation than an obligation to behave reasonably." A discretion may be exercised "unreasonably", "subjectively", "idiosyncratically" or "selfishly" without it following that the discretion has been exercised arbitrarily or dishonestly. What is objectively "unreasonable" may make sense to a particular contracting party with unorthodox business or non-business objectives. Even if a discretion is "unreasonably" exercised because it extends beyond the proper contractual rights of the party exercising the discretion, that does not necessarily engage any element of bad faith, even though it is a breach of contract. Choosing an option that is subsequently found to be "unreasonable" is a long way from dishonesty or arbitrariness.

[60] When a contract gives one party a discretion on how to perform, that is a method of risk allocation between the parties to the contract. They have contracted and agreed that the party with the discretion will have an element of power over how performance is to be accomplished. This may be because all of the possible situations surrounding performance are impossible to

2017 ABCA 1 (CanLII)

predict, meaning that one party or the other has to have some flexibility at the time of performance. Alternatively, it may simply be part of the bargain: one party was only prepared to enter into the contract on the basis that it was given an element of discretion as to how it will actually perform. Whatever the reasons, if one party is given a discretion it should be allowed to exercise that discretion without being second-guessed by the courts with the benefit of hindsight.

[61] The trial reasons go so far as to suggest that the parties cannot contract out of the "common law duty of reasonable exercise of discretionary contractual power". This would mean that:

(a) if the decision to terminate without cause was properly characterized as a "discretion" (which it is not), and

(b) if an employer had to give some explanation as to why it was terminating without cause (which it need not do),

then any attempt to specify in the contract what the parties agree would be "reasonable" would be completely ineffectual. For example, if the parties agreed that termination, while without cause, would be "reasonable" because of a specified downturn in the economy, a specified drop in the price of oil, a specified drop in sales, or any other eventuality, that covenant could not be relied on. What is "reasonable" could only be finally determined by a trial judge, with hindsight, many years after the events. Not only does this undermine the concept of contractual autonomy, it creates an unreasonable level of commercial uncertainty.

[62] To illustrate, the trial reasons at para. 109 conclude that the requirement in the Plan of continuous employment on the vesting date "appears to be inherently contradictory to the reasonable expectations of the contracting parties, where the employer seeks key talent and the employee aims to provide his skillful services for performance based compensation". First of all, whether the arrangement meets the expectations of the parties is for the parties to decide, and that is the contract they have made. Secondly, one of the objectives of the Plan was to "retain key talent" and another was to encourage employees to focus on long-term portfolio gains, not short-term returns. Both of those purposes are served by bonuses that do not vest for four years. But the main point is that the courts have no mandate to examine contracts to see whether the court thinks that the bargain makes sense: ***Levinsky v Toronto-Dominion Bank***, 2013 ONSC 5657 at para. 90, 117 OR (3d) 106.

[63] Further, the "reasonable expectations of the contracting parties" are to be found in the wording of the contract, not in the court's perception of what is "fair" in the abstract. The whole agreement clause and the parole evidence rule preclude parties from introducing implied clauses that are inconsistent with the wording of the contract under the guise of "reasonable expectations". ***Bhasin*** at paras. 74-5 does discuss the impact of a "whole agreement clause" on the duty of honest performance. It observes that the duty of honest performance is not an implied term of the contract, but rather a background concept, and so it is beyond the reach of

most whole agreement clauses. But ***Bhasin*** relates primarily to performance of the contract, not its contents. ***Bhasin*** suggests that parties cannot contract out of the duty of honest performance, but even it accepts at para. 77 that the parties could in the contract "influence the scope of honest performance in a particular context".

[64] The principles set out in ***Bhasin*** (and any extension of it) do not enable either party to insist on covenants and provisos that are not set out in writing in the agreement, nor do they allow the parties to ignore the plain wording of the agreement. ***Bhasin*** does not allow the insertion of provisions inconsistent with the actual terms of the contract. The Long Term Incentive Plan states that the participant must be actively employed on the vesting date. The enforceability of that provision has nothing to do with the whole agreement clause, and ***Bhasin*** does not permit the respondent to simply ignore that provision in the contract because he wishes, with hindsight, that he had made a different bargain.

[65] The discussion about "a common law duty of reasonable exercise of discretionary contractual powers" turned out to be an unfortunate distraction. The trial judge found at para. 115 that there was no bad faith in the respondent's termination, and he produced no evidence it was related to his bonuses. The terms of the Long Term Incentive Plan are clear, and do not involve any exercise of discretion. A clear feature of the Long Term Incentive Plan is that bonuses do not vest for four years. It must have been obvious to the respondent that unless his employment with the appellant lasted for at least four years he would never receive any bonus under this Plan. Specifically, if he was terminated without cause within four years, any expectation of a bonus would be lost. Those are the terms of employment to which the respondent agreed. If he wished to earn some bonuses under the Plan in the eventuality that he was terminated without cause within four years, it was incumbent for him to negotiate such a provision. Not having done so, he cannot now ask the court to retrospectively include such a term on the basis that such a term might be "reasonable" or "fair": ***McRae v Marshall*** (1891), 19 SCR 10 at p. 39.

Relief from Forfeiture

[66] In the alternative, the respondent applied for "relief from forfeiture". The respondent argued that even if he had not met the terms of the Long Term Incentive Plan, the court should relieve him of that failure, and award him his unearned bonuses in any event.

[67] The Long Term Incentive Plan uses some unfortunate wording. It refers to the awarding of "grants" in each year of the four-year bonus cycle. "Grants" are usually thought of as sums that are paid without performance; they are contrasted with "fees for service" which are earned. The "grants" under the Plan are never actually paid as such, and are merely base numbers or bookkeeping entries placed into the bonus formula at the end of the bonus cycle. Secondly, the Plan talks about the employee "forfeiting" the "grants" in some circumstances. Since the grants are never paid, and are merely formula entries, it is anomalous to say that they are "forfeited". It

2017 ABCA 1 (CanLII)

is only the actual bonuses that could be forfeited, and they could only be forfeited once earned and vested at the end of the four-year cycle.

[68] The Plan states that to be eligible for a bonus, the employee must be in active employment on the vesting date. It says that if the employee is no longer employed at that time, then all “grants” or allocations are “forfeited”. In that context, the word “forfeited” means previously allocated “grants” are unearned, will never vest, and will never be payable. Since the “grant” is only a formula number used to calculate the eventual bonus, the term “forfeiture” in this context only confirms that the bonuses do not vest merely on the allocation of the “grant”, but only in four years’ time.

[69] The word “forfeiture” can have many meanings. It has a technical meaning when associated with the equitable jurisdiction of the court to “relieve from forfeiture”. In this context a “forfeiture” occurs when one party breaches the contract, thereby entitling the other party to take certain action, in extreme cases the termination of the contract. Where the consequences are significantly disproportionate to the breach, there is a limited right in equity for “relief from forfeiture”: ***Ontario (Attorney General) v 8477 Darlington Crescent***, 2011 ONCA 363 at paras. 86-87, 333 DLR (4th) 326. That, however, is not what is happening here.

[70] The respondent was never alleged to be in “breach” of any term of the contract; the defence is that he never became entitled to receive a bonus, because a bonus never vested in his favour. The respondent was not in breach, but had merely failed to satisfy a condition precedent. This is simply a failure to demonstrate an entitlement to have the appellant perform the contract. It means that neither the appellant nor the respondent were in breach, because the circumstances calling for performance simply never arose. The equitable jurisdiction to relieve from forfeiture does not extend to excusing non-compliance with conditions precedent: ***Greville v Parker***, [1910] AC 335 at pp. 340-1 (PC); ***Lavoie v T.A. McGill Mortgage Services Inc.***, 2014 ONCA 257 at para. 43, 119 OR (3d) 651; ***Clark Auto Body Ltd. v Integra Custom Collision Ltd.***, 2007 BCCA 24 at para. 30, 62 BCLR (4th) 315. There never having been any “forfeiture” as that term is understood in equity, the equitable power to “relieve from forfeiture” does not arise.

[71] In any event, relief from forfeiture is discretionary: ***Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co.***, [1994] 2 SCR 490 at p. 504. It would be unreasonable to exercise that discretion in a way that gives an employee bonuses that were clearly not earned. “Relief from forfeiture” does not entitle the court to permit performance other than as specified in the contract just because one party is unable to perform its obligations as written, and is not a method of rewriting the contract. Awarding a litigant a bonus he or she has not earned is not “relief from forfeiture”. It would be a form of unwarranted judicial benevolence.

2017 ABCA 1 (CanLII)

2017 ABCA 1 (CanLII)

Unconscionable Transactions

[72] The respondent argues that the contract is unconscionable. The employment contract is not, of course, unconscionable when considered as a whole; it potentially entitled the respondent to earn very significant bonuses, both annually and in the longer term. The respondent argues, however, that the requirement for continuous employment on the Long Term Incentive Plan vesting date is unconscionable.

[73] The test for unconscionability is strict. It is usually founded in some misconduct or sharp practice at the formation of the contract, often when there is an imbalance in bargaining power: ***Canadian Imperial Bank of Commerce v Ohlson***, 1997 ABCA 413 at paras. 18-24, 57 Alta LR (3d) 213, 209 AR 140. In ***Harry v Kreutziger*** (1978), 95 DLR (3d) 231 at p. 241, 9 BCLR 166 at p. 177 (CA) the doctrine was said to come down to the "single question of whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded".

[74] The doctrine does not exist to allow parties to escape contractual provisions that turn out to be less desirable than originally thought. The respondent entered into his employment contract knowing that he would get a base salary, annual bonuses, and the potential of earning long-term bonuses if he stayed employed for at least four years. The contract also clearly provided that the respondent had to be employed on the vesting date to get a long-term bonus. None of these provisions is harsh, sharp, or unconscionable.

[75] To illustrate, there is nothing harsh or unconscionable about the following aspects of the contract:

(a) Two stated objects of the Long Term Incentive Plan are to "retain key talent", and to "minimize the risk of paying for transitory performance". Neither of those objectives are unreasonable or unexpected. Any employer wants to retain key talent. An investment manager obviously wants to encourage a view to the long term performance of the investments, and discourage decisions that will generate short-term profits because they will generate short-term bonuses.

(b) Under the Long Term Incentive Plan bonuses do not vest for four years. There is no element of harshness or unconscionability in this. The delayed vesting is consistent with the expectation that the bonuses will retain the key talent in the medium term. Further, delayed vesting is consistent with avoiding "paying for transitory performance". Unless gains are maintained, on average, for four years, attractive bonuses will not be generated by the formula in the Plan. Again, there is nothing unconscionable about this in the context of employment of portfolio managers.

(c) The key feature of the Plan is that a participant who is not actively employed on the vesting date is not eligible for the bonus. This is consistent with the legitimate object of "retaining key talent": obviously if the talent does not stay beyond the vesting

> date (four years), that legitimate objective has not been met, and there is no reason to compensate employees who have not met the very objectives of the Plan. There is nothing unconscionable about this either. The respondent well knew this was a term of the plan when he entered into the contract of employment.

In summary, the key provisions of the Plan are neither harsh nor unconscionable, and in fact achieve legitimate business objectives.

[76] The respondent is not an unsophisticated person. The Long Term Incentive Plan was designed for senior executives who would be capable of understanding its provisions: ***Levinsky v Toronto-Dominion Bank*** at para. 44. The terms of the Plan do not come close to being unconscionable.

Employment Standards

[77] The respondent argues that the provision "forfeiting grants" is invalid by reason of secs. 1(j), (x), 4, 8 and 9 of the *Employment Standards Code*, RSA 2000, c. E-9. These sections provide that on termination an employee is entitled to be paid all earnings within three days. The respondent argues that the statute implies that any contractual term that "forfeits" earnings is unenforceable.

[78] The *Employment Standards Code* has no application here. It provides, at best, that if the respondent had earned any long-term bonuses (because they had vested at the end of the four year cycle) then those bonuses would have to be paid to him within three days. As noted, the "grants" are merely allocations to be entered into the bonus formula at the end of the four year cycle. The respondent never earned any bonuses, so there were no earnings to pay or forfeit.

[79] On the respondent's interpretation, the *Code* could inhibit many forms of compensation for employment that were deferred, or subject to compliance with any performance standards. The enforceability of a bonus plan, profit sharing plan, pension plan, or other form of compensation calculated over a lengthy period of time would be unclear. That cannot have been the intended interpretation. The *Code* does not provide that unearned earnings have to be paid.

Conclusion

[80] In conclusion, it is worth noting that the "reasonableness" argument has two sides to it. From the respondent's point of view, the appellant is not acting reasonably because it refuses to pay a bonus when it has benefited from his hard work, which non-payment is justified by the appellant's own decision to terminate his employment. This is said to be an "unreasonable exercise of discretion". However, from the appellant's point of view the respondent is unreasonably claiming a bonus to which he agreed he would not be entitled. There is a particular danger in forgetting that the "reasonableness" analyses require a consideration of the position of both sides, remembering that the contracting parties are entitled to promote their

2017 ABCA 1 (CanLII)

own best interests. The concepts of "fairness" and "reasonableness" are not subjective tests, and do not depend on the expectations or interests of only one of the contracting parties.

[81] The decision at trial discloses errors of principle and errors of law. The appeal is allowed, and the respondent's action is dismissed.

Appeal heard on November 3, 2016

Memorandum filed at Edmonton, Alberta
this 4th day of January, 2017

Slatter J.A.

Authorized to sign for: O'Ferrall J.A.

2017 ABCA 1 (CanLII)

Berger J.A. (concurring in the result):

[82] The respondent was employed by the appellant in 2010 as vice president of relationship investments. His contract of employment included a termination clause which provided that he could be terminated without notice or pay in lieu of notice. Payment due in lieu of notice is not in dispute.

[83] His contractual compensation was premised in part on a "pay for performance philosophy" that included bonus and performance grants as "a component of the total compensation package". In the three years that followed his employment in 2010, the respondent was notified that in recognition of his employment efforts he had been approved for certain Grants pursuant to the appellant's Long Term Incentive Plan ("LTIP"). The LTIP policy documents speak of "performance" on the part of the employee and the basis for receiving Grants is "to motivate, recognize, reward and retain senior management and other key employees of [the corporation]." When an employee is awarded a Grant, he is required to sign a Participation Agreement.

[84] The *2009 LTIP Plan* provided that:

> "Unless otherwise stipulated, the participants must be actively employed by AIMCo, without regard to whether the Participant is receiving, or will receive, any compensatory payments or salary in lieu of notice or termination on the date of payout, in order to be eligible to receive any payment." (AEKE, A11)

[85] In 2011, the LTIP provisions included a clause under the rubric of "termination without cause" that "all unvested grants are forfeited as of the date of termination of active employment" and that eligibility for payment "unless otherwise stipulated" requires that participants "must be actively employed [by the corporation]". That accords with the Participation Agreement signed by the respondent at that time which reads, in part, as follows:

> "Subject to the terms and the conditions of the Plan and this Participation Agreement, within 6 months after the maturity date of the Grant (the "Payout Date"), the Participant will receive the cash equivalent value of the Grant. To receive payment, the Participant must be actively employed by the employer on the Payout Date."

[86] The LTIP documents establish that a Grant which has been approved for an employee vests at the end of a 4 year performance cycle. If the conditions of the LTIP are met, a Grant which is vested is then paid out within 6 months of the end of the relevant performance cycle. At that point, the payout value is calculated.

[87] The respondent was terminated without cause on June 3, 2013. It follows that he was not actively employed by the appellant on the Payout Date.

2017 ABCA 1 (CanLII)

2017 ABCA 1 (CanLII)

[88] As I see it, the appeal can be disposed of on a consideration of whether the trial judge erred in law in determining that the respondent had an "earned entitlement" to compensation pursuant to the LTIP.

[89] The contractual arrangement makes clear that the right to participate in the Plan and to receive performance grants does not equate with the right to payment. The right to payment is only earned on the "vesting" or "maturity" date of the Grant. Approval of a LTIP grant does not create a vested right.

[90] I appreciate full well the proposition that emerges from ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 2 SCR 633 that the proper approach to contractual interpretation includes "recognizing that meaning derived from context includes the purpose of the agreement and the nature of the relationship created by the agreement".

[91] I would add only that, in my opinion, the trial judge erred in finding the contract permitted or, for that matter, required the appellant to exercise a discretion to pay or declare forfeited the LTIP Grants on termination without cause.

[92] The trial judge concluded that AIMCo had discretion to pay the LTIP Grants on termination, as the *2011 LTIP Agreement* stated that the LTIP Grants "may be forfeited" on the date of termination of active employment. The *2009 LTIP Agreement* did not include this language. Thus, she found there was an element of discretion on AIMCo's part in requiring forfeiture of all interest in the LTIP Grants (Reasons, at para. 108, F19).

[93] While it is true that the guidelines in some circumstances confer such a discretion on the appellant, the "active employment" condition precedent on the "date of payment" governs termination without cause. The language clearly specifies that unvested LTIP Grants will be forfeited on termination without cause.

[94] With great respect, the summary trial judge did not have the latitude to rewrite the contract in the absence of evidence of bad faith or duress when these sophisticated parties chose to differentiate between accrued grants (liable to forfeiture) and vested grants (entitling an employee to compensation). Nor is there any evidence in the record that the appellant knowingly mislead the respondent, lied to him or acted dishonestly in the performance of the contract. It follows that there is, with respect, no basis for the trial judge's application of that which she described as "the common law duty of reasonable exercise of discretionary contractual power" in this case.

[95] In my opinion, the respondent did not acquire an entitlement to payment upon receipt of the Grants. That which was conferred was the prospect of payment subject, *inter alia*, to active employment on the Payout Date.

[96] I would allow the appeal.

Appeal heard on November 3, 2016

Memorandum filed at Edmonton, Alberta
this 4th day of January, 2017

Berger J.A.

2017 ABCA 1 (CanLII)

Appearances:

J.T. Kondro
for the Respondent

H.J.D. McPhail, Q.C. and V. Giles
for the Appellant

2017 ABCA 1 (CanLII)