COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Nardulli v. C-W Agencies Inc.,*
2014 BCCA 31

Date: 20140128
Docket: CA040455

Between:

Vito Nardulli

Respondent
(Plaintiff)

And

C-W Agencies Inc.

Appellant
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated November 13, 2012 (*Nardulli v. C-W Agencies Inc.*, 2012 BCSC 1686, Vancouver Docket S090014).

Counsel for the Appellant and Respondent on cross-appeal:	D.P. Church, Q.C. I. Schildt
Counsel for the Respondent and Appellant on cross-appeal:	G. Holeksa R. Germann
Place and Date of Hearing:	Vancouver, British Columbia November 19 and 20, 2013
Place and Date of Judgment:	Vancouver, British Columbia January 28, 2014

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Harris

Summary:

At trial, the plaintiff claimed damages for wrongful dismissal and profit share during his employment and in the notice period. The trial judge awarded him 21 months' wages in lieu of notice and profit share for the period of his employment. His claim to profit share in the notice period was dismissed as was his claim to special costs.

Held: appeal allowed in part; cross appeal dismissed. The judge's finding that the plaintiff was wrongfully dismissed and the award of 21 months' wages was upheld, as was the decision not to award special costs. However, the judge erred in the award of profit share. The profit share plan was never implemented. Although the plaintiff was eligible for a discretionary bonus, the employer properly exercised its discretion in deciding not to pay an additional bonus to the plaintiff.

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

[1] Vito Nardulli was employed by C-W Agencies Inc. ("C-W") from 1986 to 2008, except for a nine month period beginning in January 2006, when he was dismissed for cause. He was rehired in October 2006. In September 2008, C-W informed Nardulli that he was not entitled to payments under an alleged profit sharing plan. Nardulli was asked to sign a release waiving any right to share in C-W's profits. Nardulli refused, sought legal advice and commenced an action against C-W on January 2, 2009. In his statement of claim, Nardulli pleaded that at all material times, it was a term of his contract of employment that he was entitled to participate in a company profit sharing plan as an integral part of his remuneration. He claimed it was a breach of his contract of employment to refuse payment.

[2] On January 22, 2009, C-W terminated Nardulli's employment for cause. Nardulli subsequently amended his claim to include damages for wrongful dismissal.

[3] Nardulli's claims were tried in the Supreme Court over 37 days between October 2010 and June 2011. The trial judge delivered very long reasons indexed as 2012 BCSC 1686. The judge awarded Nardulli $262,500 in damages for wrongful dismissal and $1,332,149 "for profit sharing", $582,149 of which was to be remitted to Canada Revenue Agency on account of tax, and $750,000 to be paid to Nardulli.

[4] The judge held that an additional sum of $895,000 paid to or on behalf of Nardulli were gifts which were not, as C-W alleged, to be taken into account in determining his profit share.

[5] C-W appeals the order.

[6] With respect to Nardulli's "profit share", C-W alleges the judge erred: in deciding the issue of profit sharing on a legal basis that was not pleaded or argued at trial; in finding that a bonus formed an "integral part" of Nardulli's compensation; and, having found that Nardulli was entitled to a discretionary bonus, failing to consider whether C-W had reasonably exercised its discretion to refrain from paying a bonus to Nardulli.

[7] With respect to wrongful dismissal, C-W contends the judge erred in concluding that the scope of Nardulli's employment was unclear and by failing to consider accumulated cause in finding whether or not Nardulli was wrongfully dismissed.

[8] Nardulli cross-appeals on the grounds that the judge erred in not awarding him an amount for profit share during the notice period and in refusing to award him his special costs.

Facts

[9] The reasons for judgment fully set out the evidence. I need not repeat it here. The essential facts relevant to the appeal are as follows.

[10] C-W's business is primarily the international marketing and resale of lottery tickets purchased in Canada and elsewhere to purchasers outside of Canada.

[11] Randall Thiemer was, until his death in 2008, the sole shareholder and director of C-W. Sometime in 2000 he announced his intention to implement an employee profit sharing plan.

[12] A draft profit sharing plan was prepared by C-W's lawyers on or about November 15, 2000. It was to be effective from September 1, 2000.

[13] The profit sharing distributions under the draft plan required C-W's board of directors to determine the amount available for distribution, the persons entitled to participate in the plan, and the number of units awarded to each participant for the year.

[14] The draft profit sharing plan stated that the distribution amount would be 25% of available cash. The available cash was to be calculated based on the total cash flow from operating activities for the year, less 2.5% of sales as a reserve of working capital and fixed assets and 1.5% of sales as a reserve of prepaid sales.

[15] Profit sharing distributions were to be calculated using a specific formula set out in clause 5.5 of the draft plan.

[16] Under the draft plan, Nardulli was to receive two unit entitlements for the year ending August 31, 2001.

[17] A resolution approving the draft profit sharing plan by the C-W board of directors, of which Thiemer was the then sole director, was never signed by Thiemer.

[18] Nardulli commenced employment with C-W in March 1986 and eventually worked his way up to Vice-President Operations. Nardulli became drug dependent and his work performance suffered. His employment was terminated for cause in January 2006. He did not, at that time, claim entitlement to profit sharing. When Nardulli was rehired in October 2006, he was reinstated with the same benefits and annual salary of $150,000, effective from October 1, 2006.

[19] At about the time Nardulli returned to work in October 2006, he told Thiemer that he and his family had suffered financially following his dismissal. Thiemer offered to purchase a house for Nardulli. Within weeks, Thiemer gave Nardulli $150,000 (for household furnishings and to pay for drug rehabilitation) and

purchased a home for him for a total of approximately $895,000. There is some evidence that suggests Thiemer purchased the house for Nardulli rather than advancing him cash as Thiemer was concerned Nardulli would use the money unwisely.

[20] These payments, or the promise of them, coincided with Nardulli informing Thiemer in mid-October 2006, that Michael McLoughlin, who was C-W's CEO from 2004 (and who fired Nardulli in January 2006), was setting up a competing business and was circulating unflattering photographs of Thiemer. Thiemer immediately terminated McLoughlin's employment.

[21] In the years following the announcement of the profit sharing plan, some employees had raised with Thiemer their wish to be paid "profit share". Around the same time that Thiemer paid $895,000 to Nardulli, he also paid sums to other employees from his personal accounts, some of which were noted to be "profit draws":

a) on October 11, 2006, Thiemer paid $250,000 to Nick Belmonte;

b) on October 17, 2006, Thiemer paid $250,000 to Al DeJoseph;

c) on October 17, 2006, Thiemer paid $500,000 to Frank Vogt;

d) on October 18, 2006, Thiemer paid $300,000 to Marisol Malates;

e) on October 22, 2006, Thiemer paid $400,000 to Ted Weir; and

f) on November 23, 2006, he paid a further $250,000 to Nick Belmonte.

[22] These payments were in addition to two other payments that had been made earlier in the year as a result of DeJoseph and Belmonte confronting Thiemer about not receiving their profit share:

a) on June 23, 2006, Thiemer paid $250,000 to Al DeJoseph; and

b) on September 21, 2006, Thiemer paid $250,000 to Nick Belmonte.

The cheque request form for the payment to Belmonte indicated that it was for an "Advance on Profit Sharing".

[23] The foregoing amounts paid by Thiemer to employees were less than, or more than, or equal to the amount payable under the draft profit sharing plan. However, it is clear, as the judge found, that the payments were not made in accordance with the formula in the draft plan.

[24] Thiemer died on August 21, 2008. Prior to his death, Thiemer retained Brian Gardiner, a chartered accountant and certified fraud examiner, to undertake an analysis of the amounts Thiemer had paid to various C-W employees in October 2006 so as to achieve "parity" among the employees.

[25] A complicating feature in this trial was that Thiemer had died and there was little evidence as to his intentions with respect to the profit sharing plan.

[26] Critical evidence of Thiemer's intentions came from a recorded telephone conversation in which Thiemer instructed Gardiner to undertake the analysis to achieve "parity" in the amounts Thiemer had paid C-W employees from his personal accounts in 2006. The telephone instructions made on August 21, 2007 were tape recorded by Gardiner and include the following:

> There's a lot of people's pay that really don't have any semblance to each other, uh you know people and the profit sharing plan which never worked out and I don't think ever will, but uh you know with everybody thinking there were profit coming you know I'm supposed to make it so and I was doling out money, you know so, from my personal account to make it so and so you know but I don't want it out of my personal account in the Cayman's, or out of my personal account in Canada and a I want it out of the company and what I would like to do is do an audit and see who got what and how they, how they you know, you know sort of parity if any ...
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> . . .
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> You know some people are under balance, some people are way over balance on their profit draws and I just, I just paid them out as for loans, personal loans and that sort of thing and I just want to pacify them, except as bonuses I guess.
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> [Emphasis Added.]

[27] Gardiner affirmed Thiemer's view of the non-existence of the profit sharing plan:

> Q Any discussions with Mr. Thiemer about these payments to employees? All this work you had done?
>
> A. We talked about the issue of the profit-sharing plan, and he told me that he had never successfully completed the implementation of a public profit-sharing plan. He told me that he understood it was his obligation to communicate to his senior people that there wasn't one.

[28] These instructions reflect the very unusual circumstances of this case. It is plain that Thiemer, as the company's sole shareholder, treated C-W as his own financial fiefdom. Thiemer was, in essence, C-W. He paid very significant sums from his personal accounts in the expectation that they would eventually be "run through the company" and he would be repaid the sums he had advanced on behalf of the company.

[29] After conducting the review, Gardiner prepared documents dated June 25 and 26, 2008 which identified payments to C-W employees as "profit share/bonus". The payments were confirmed by Thiemer initialling both documents. The document dated June 26, 2008 included the following statement:

> The payments in 2005 and 2006 noted above as #1-9 were each, the net after tax amount of the profit share/bonus advanced to by Randy [Thiemer] on behalf of C-W.
>
> Accordingly C-W should be declaring the payments at the grossed up amounts and remitting the taxes due.

[30] The payment described as item #2 was the $150,000 payment to Nardulli on October 11, 2006. The paragraph immediately following the list of payments referred to the funds that had been advanced for the purchase of a house that was registered in Nardulli's name.

[31] Following Thiemer's death, Gardiner completed the task assigned to him to "even up" the payments to C-W employees by way of a written schedule setting out his recommendations to the board of directors for amounts he defined as "discretionary bonuses". The schedule was adopted by directors' resolution on

September 23, 2008. Nardulli was excluded from the schedule and therefore was not entitled to further payment. A note to the schedule explains that in 2006 Thiemer had provided Nardulli with $150,000 and funds to purchase a house. The note further explains that Nardulli was fired for cause in 2006 and therefore ineligible for "profit sharing".

[32] When Nardulli was advised that the payments made to him in 2006 would be treated as bonuses, he told Gardiner he could not afford to pay tax on the amounts he had received. Gardiner testified that because there was no profit sharing plan, the parity issue had to be resolved through discretionary bonuses, or, in Nardulli's case, by characterizing the advances as gifts, so as to allow Nardulli to avoid paying tax. Gardiner testified that in order for Nardulli to avoid paying tax on these amounts, he decided to characterize the payments to Nardulli as "gifts" unrelated to his employment with C-W.

[33] On November 4, 2006, Nardulli demanded to be paid his alleged profit share, a demand that astounded Gardiner since Nardulli had already received a "gift" of $895,000. On November 26, 2008, Nardulli went on medical leave and never returned to work. As noted, he commenced his action against C-W on January 2, 2009 and was dismissed for cause on January 22, 2009.

Discretionary Bonus and Profit Sharing Issues

[34] In her reasons, the judge summarized her factual findings with respect to the profit share issue, albeit in the context of determining whether a bonus would have formed part of Nardulli's compensation during the notice period (at para. 555):

> 1. Mr. Thiemer promised profit sharing to the senior management employees;
> 2. A Profit Sharing Plan was drafted but not formerly implemented by Mr. Thiemer;
> 3. Mr. Nardulli was to have been a participant in the Profit Share Plan;
> 4. Mr. Thiemer continued to promise profit sharing to various senior employees over the years and, with other senior employees, expressly contracted on behalf of C-W to pay profit sharing under the Profit Sharing Plan, even though the Plan was never formerly implemented;

5. Since around 2000, the salaries of senior management were capped at $150,000, and there were no salary increases in recognition of the fact that senior management employees would receive profit sharing in lieu of any salary increases;
6. Mr. Thiemer made payments to Mr. Belmonte as an “advance” on his profit sharing;
7. Mr. Thiemer acknowledged to Mr. Gardiner that although the Profit Sharing Plan never worked out, everyone believed that they would be receiving profit sharing, and he had “to make it so” and was “doling out money...to make it so”;
8. Mr. Thiemer asked Mr. Gardiner to determine what payments he had made from his personal account as profit draws, and to “even out” the payments and arrange for those payments to be made by C-W;
9. Mr. Gardiner based the calculation of the profit sharing payments in part on the terms of the draft Profit Sharing Plan;
10. Mr. Gardiner recognized that Mr. Thiemer’s house purchase for Mr. Nardulli and the $150,000 occurred before Mr. Nardulli was rehired, and was a gift from Mr. Thiemer; and
11. The house and the $150,000 was not an advance on profit sharing, or otherwise related to Mr. Nardulli’s employment.

[35] The judge then stated:

> [556] Where the Court concludes that the bonus constituted an integral part of the plaintiff’s salary, and the process of determining the bonus under the contract involves an element of discretion, the court will proceed on the basis that this discretion must be exercised reasonably and in accordance with objective criteria: *Ivanore v. Bastion Development Corp*. (1993), 47 C.C.E.L. 74.
>
> [557] Mr. Gardiner described the payments he determined as discretionary bonuses. However, the payments Mr. Thiemer personally made were considered by him to be profit draws. I accept that they were discretionary because there was no established formula; the discretion must be exercised reasonably and objectively.
>
> ...
>
> [560] Furthermore, I do not think that C-W can argue that the Profit Sharing Plan never existed, yet at the same time argue that under the terms of the Plan Mr. Nardulli is not entitled to profit sharing because he was terminated for cause. In any event, Mr. Nardulli may have been terminated for cause in January 2006, but when he was rehired in October 2006 it was on terms that all of his benefits be reinstated, which would include those under the Profit Sharing Plan or the profit draws Mr. Thiemer knew that the senior management employees reasonably expected was an integral part of their overall compensation.

> **C. Disposition of Profit Sharing Claim**
>
> [561] I accept Mr. Nardulli's argument that the evidence supports a finding that C-W created a reasonable expectation of a Profit Sharing Plan, and those expectations were crystallized into an entitlement to receive payment when Mr. Thiemer paid 'advances' on profit sharing to senior management employees in 2006.
>
> [562] The Profit Sharing Plan document was drafted and finalized, except for Mr. Thiemer's signature. Mr. Thiemer then advised the senior management that the Plan existed and that it was meant to provide significant remuneration as a way to recognize the senior management employees' devotion to C-W over the years. It was also written into Mr. DeJoseph's contract when he was hired.
>
> [563] The oral representations made by Mr. Thiemer were intended to have contractual force. He recognized that the employees expected to receive profit sharing. Raises were not given and senior management salaries were left at $150,000 in lieu of the intended profit share payments. When employees confronted Mr. Thiemer about profit sharing or salary increases, he did not deny the existence of profit sharing or try to back out of his promise to pay profit sharing. In fact, he did the opposite.
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> [564] Although Mr. Thiemer paid several C-W employees substantial amounts that were to be 'advances' on the profit shares under the Plan, he does not appear to have followed a formula or to have pegged the payments to anything in particular. However, there is no evidence that he did not appreciate what he was doing.

[36] Nardulli's fundamental pleading was that C-W's profit sharing plan was a material term of his contract of employment. C-W's defence, which the judge appears to have accepted, was that C-W never implemented the profit sharing plan.

[37] The trial judge found that the payments made by Thiemer to Nardulli in October and November 2006 were in the nature of a gift. The judge concluded that the amounts paid to Nardulli were gifts unrelated to his employment with C-W because they were offered at a time when he was not employed by C-W. On that basis, she considered that the "gifts" should not have precluded Nardulli from an award of profit share. In my opinion, that conclusion is incompatible with the evidence that Nardulli was reinstated to his employment as of October 1, 2006, and the evidence that the payments were actually made after he returned to work. It also ignores the June 2008 document initialled by Thiemer that indicated the $150,000 payment to Nardulli was "profit share/bonus". Gardiner designated the $150,000 payment as a "gift" solely for the purpose of allowing Nardulli to avoid paying tax on

the amount. Furthermore, it ignores the factual context in which the "gifts" were made − at a point in time when Thiemer was rehiring Nardulli, a long-time employee whose re-employment effectively meant he had never left the company.

[38] The trial judge also found, incongruously, that although the profit sharing plan was not implemented, Nardulli was nonetheless entitled to profit sharing based on Thiemer's "oral representations" which were "intended to have contractual force". She concluded that this created a "reasonable expectation" of payment, which "crystallized into an entitlement" following the "advances" on profit sharing paid to other employees in 2006.

[39] The judge agreed with C-W, however, that Nardulli was not entitled to any profit sharing payments in the notice period.

[40] On appeal, C-W's position with respect to the finding that Nardulli was entitled to profit sharing was stated as follows:

> (a) Nardulli's claim, as pleaded and argued at trial, was for payment under a specific "profit sharing plan". Having determined that no such "profit sharing plan" was implemented, it was not open to the Court to grant an award on the basis of a discretionary bonus;
>
> (b) to the extent it was open to the Trial Judge to make an award on the basis of a discretionary bonus, she erred in doing so, as Nardulli did not establish any contractual right to receive such a bonus; and
>
> (c) even if Nardulli did establish a contractual right to receive a bonus, the bonus was still discretionary in nature and C-W acted reasonably in concluding that Nardulli was not entitled to any bonus payment.

[41] C-W's first position—that it was not open to the judge to grant an award on the basis of a discretionary bonus, since this was not pleaded—has some force. However, I do not need to address it because, although I conclude that Nardulli had some kind of entitlement as a result of the oral representations made by Thiemer, in

this case the discretion not to give him a bonus over and above what he had already received was reasonably exercised. Moreover, C-W's submission that the award should not have been made on the basis of "discretionary bonus" is somewhat anomalous because the order appealed from refers to Nardulli's entitlement to "profit sharing"; it does not refer to a discretionary bonus.

[42] This anomaly may be explained by the fact that the judge's reasons are unclear as to the precise characterization of Nardulli's entitlement. Doing the best I can with the findings that are supported by the evidence, I conclude that Nardulli was not entitled to profit sharing as contemplated by the draft profit share plan. However, the evidence does support a finding that he was eligible for a discretionary bonus that was aimed at achieving parity among the employees of C-W. In my view, the critical question is whether C-W reasonably exercised its discretion in refusing to pay Nardulli a discretionary bonus because he had already received $895,000. I conclude C-W did reasonably exercise its discretion.

[43] My reasons for these conclusions follows.

[44] Central to Nardulli's argument as to profit sharing was that C-W "created a reasonable expectation" of a profit sharing plan that "crystalized" when other employees were paid amounts described as profit share, a submission the judge accepted (at para. 561).

[45] However, the proper legal question to be asked was not whether Nardulli had a reasonable expectation of a profit sharing plan, but rather, whether C-W was under a legal obligation to pay profit share. As stated in *Lavarack v. Woods*, [1966] 3 A.E.R. at 690:

> "The general rule as stated by Scrutton, L.J. in *Abrahams v. Herbert Reiach, Ltd.*, [1922] 1 K.B. 477, that in an action for breach of contract a defendant is not liable for not doing that which he is not bound to do, … The law is concerned with legal obligations only and the law of contract only with legal obligations created by mutual agreement between contractors - not with the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do. …

[46] Nardulli did not have a written employment contract. The essential terms of his employment were recorded on the Employee Personnel Notification Form submitted on October 17, 2006 which states "reinstate all benefits and pay rate". The fundamental issue before us is the nature of the "benefits", if any, to which Nardulli was entitled under his contract of employment. That determination cannot rest, as the judge assumed, on payments made to other employees because their contracts were as between them and C-W.

[47] It is difficult to reconcile the judge's finding at para. 555 that the draft profit share plan was "never formerly implemented" (by which I understand the judge to mean it was not implemented) with her finding at para. 562, that Nardulli's "expectation" of profit sharing "crystallized into an entitlement" when Thiemer paid "advances" on profit sharing to senior management employees in 2006.

[48] There can be no question that Thiemer told his employees in 2000 that he wanted them to share in the profits of the company they had helped to build.

[49] There is also no doubt that Thiemer recognized that the formal profit sharing plan "had never worked out", but that he nonetheless wanted his employees to be compensated for their part in the company's success. Indeed, in some instances the payments made by Thiemer to others from his personal accounts in October and November 2006 were noted as related to "profit sharing".

[50] Most significantly, as the judge acknowledged at para. 564 of her reasons, Thiemer's payments to other employees were not made in accordance with the draft profit sharing plan, and were not "pegged … to anything in particular".

[51] Profit sharing plans, such as the draft plan in this case, typically call for profit sharing to be paid on the basis of a formula that reflects the profitability of the company. These have also been called "formula bonuses": *Leduc v. Canadian Erectors Inc.* (1996), 18 C.C.E.L. (2d) 216 at paras. 46−47 (Ont. Ct. Jus. Gen. Div.). If the profit sharing plan had in fact been implemented, it would have created a contractual right to a non-discretionary profit-sharing bonus.

[52] On the other hand, non-formula bonuses, while they too may reflect the success or profitability of the company, are awarded on a discretionary basis. Such discretion may take into account a myriad of factors. However, they are not paid on the basis of a formula.

[53] The judge found that the payments made to the employees did not in fact follow any formula. This, in and of itself, is compelling evidence that the draft profit sharing plan was not implemented. In finding that there was no formula, the judge was precluded from finding that the payments were made pursuant to a non-discretionary, formula-based profit sharing plan.

[54] In my opinion, the judge's finding that he was entitled to profit sharing as contemplated by the draft profit share plan cannot be sustained. The finding does not give effect to the recorded evidence that Thiemer acknowledged that the plan "never worked out". The plan was, as the judge found, "not implemented". Neither Thiemer nor C-W, by course of conduct over eight years, confirmed the existence of the plan (i.e., by making payments specifically in accordance with the draft plan). Indeed, Nardulli never demanded payment of profit share when he was dismissed in 2006. At the very most, the payments made in 2006 were to pacify employees for the fact that the profit share plan had *never* been implemented.

[55] That leaves to consider whether Thiemer's oral representations and conduct gave rise to a different kind of entitlement—such as a discretionary bonus. For ease of reference, the judge's reasons on this point are repeated:

> [556] Where the Court concludes that the bonus constituted an integral part of the plaintiff's salary, and the process of determining the bonus under the contract involves an element of discretion, the court will proceed on the basis that this discretion must be exercised reasonably and in accordance with objective criteria: *Ivanore v. Bastion Development Corp*. (1993), 47 C.C.E.L. 74.
>
> [557] Mr. Gardiner described the payments he determined as discretionary bonuses. However, the payments Mr. Thiemer personally made were considered by him to be profit draws. I accept that they were discretionary because there was no established formula; the discretion must be exercised reasonably and objectively.

[56] I acknowledge that these paragraphs are inconsistent with the later finding that Nardulli was entitled to profit sharing. I conclude the judge either conflated entitlement to profit sharing under the draft plan with entitlement to a bonus, or considered that the quantum of the bonus should reflect what would have been paid under a notional profit share plan.

[57] In any event, Nardulli had the burden of proving a legal entitlement to a bonus. As I have observed, the proof necessary to establish entitlement to any kind of bonus was made more difficult because Thiemer's testimony was not available. As well, interpreting entitlements based on an oral agreement has additional challenges. As the Court remarked in *DeCotiis v. Viam Holdings Ltd*., 2010 BCCA 368 at para. 21:

> … As G.H.L. Fridman notes in *The Law of Contracts in Canada* (5th ed., 2006) "[i]n the case of a completely oral contract there is greater flexibility in the nature of the evidence that is admissible to prove the contents of the contract and the meaning of the language used by the parties." (At 440.) This flexibility follows intuitively from the recognition that oral contracts must often be construed without the key interpretive tool used to understand written contracts – the words of the agreement.

[58] To determine the nature of the obligation, if any, that arose from Thiemer's promises to pay "profit share" the court must apply an objective standard in order to protect the reasonable expectations of the parties: *DeCotiis* at para. 22.

[59] This question is typically asked in the context of whether an employee is entitled to bonus payments during the notice period. In that context there is no debate about the factors to be considered in determining whether a bonus forms an integral part of the employee's compensation. These factors look to the employer's course of conduct, and include:

(a) whether a bonus was received in previous years;

(b) whether bonuses were required in order to remain competitive with other employers;

(c) whether bonuses were historically awarded and the employer had ever exercised his discretion against the employee; and

(d) whether the bonus constituted a significant component of the employee's overall compensation.

Gillies v. Goldman Sachs Canada Inc., 2000 BCSC 355 at paras. 62−63, appeal allowed on other grounds, 2001 BCCA 683.

[60] Although *Gillies* deals with the question of whether a plaintiff was entitled to bonuses that would have been earned during the notice period, I consider those factors may also be usefully applied to the question of whether a plaintiff was entitled to a bonus during the employment period. The factors provide objective criteria by which to measure the reasonable expectations of the parties.

[61] There is no dispute that before October 2006, Nardulli had never been paid anything resembling a profit share or bonus. C-W relied on the judge's conclusion that the payments Nardulli received in October and November 2006 were not bonus payments, but rather gifts and that, therefore, those payments could not be classified as "past bonus payments". However, with respect, the judge overlooked the fact that the "gifts" were merely characterized as such by Gardiner in order to allow Nardulli to avoid tax he would have had to pay had they been declared bonuses. In substance, however, the payments were in the nature of a bonus.

[62] There is some evidence of a pattern of paying bonuses in the 2006 payments to other employees and the 2008 payments made to achieve parity. Those payments were, as the judge acknowledged, not made on any objective basis and were entirely arbitrary, a finding that refutes the existence of a profit sharing plan, but supports a finding that a bonus was an integral part of the employment contract.

[63] There was no evidence that bonus payments were necessary for C-W to remain competitive. Indeed, Nardulli's annual salary of $150,000 seems to have been generous compensation for the work he performed. However, C-W employees' salaries were capped at $150,000 and a bonus that recognized the profitability of the company could validly be considered a significant component of Nardulli's overall compensation.

[64] It is clear that, after Thiemer's death, Gardiner, who had been designated by Thiemer to determine a mechanism for achieving parity, concluded the amounts to

be paid were to be discretionary bonuses. This evidence, along with the other factors, supports the existence of a discretionary bonus as a term of employment. The judge alluded to this in her reasons and accepted that the decision to pay discretionary bonuses had to be exercised reasonably and on the basis of objective criteria (at para. 556): *Ivanore v. Bastion Development Corp.* (1993), 47 C.C.E.L. 74 (B.C.S.C.). However, having stated that the discretion had to be exercised reasonably, the judge did not address the question of whether C-W had exercised its discretion reasonably.

[65] The question then is whether C-W properly exercised its discretion in declining to pay Nardulli an additional discretionary bonus.

[66] As I have noted, the judge did not address this issue. Pursuant to s. 9(1)(a) of the *Court of Appeal Act*, this Court may make any order that could have been made by the trial judge. The evidence is sufficient to allow us to determine the issue omitted by the judge. In my opinion, C-W acted entirely reasonably when it took into account the amounts previously paid to Nardulli. The objective criteria adopted in Gardiner's recommendation was the substantial "gift" Nardulli had received from Thiemer, which was given in the context of an employment relationship, and which Thiemer apparently sought to recover through the company. To conclude otherwise would reward Nardulli in a way that was completely out of proportion to any of C-W's other employees and contrary to Thiemer's express directions that he wanted there to be parity in the payments he had made to employees in 2006.

[67] It follows that I would allow the appeal from that part of the order awarding Nardulli an amount for profit share. It also follows that I need not address Nardulli's cross-appeal that he was entitled to an amount for profit sharing during the 21-month notice period.

Wrongful Dismissal

[68] The trial judge reviewed in detail Nardulli's employment history with C-W from 1986 until his final termination in 2008, as well as what can only be described as his unusual relationship with Thiemer. I say "unusual" because, as the judge found,

Thiemer tolerated much of Nardulli's misconduct and was evidently reluctant, likely because of their close personal relationship, to fire him.

[69] Nonetheless, Nardulli's employment was terminated by McLoughlin, with Thiemer's approval, on January 16, 2006. The grounds for dismissal included repeated absences from work; arriving late and leaving early; being unavailable to meet with fellow managers and subordinates; sleeping in his office; continued substance abuse; and finding that the performance of his duties as the Manager of Operations was "completely inadequate and unacceptable".

[70] As noted, Nardulli was rehired on or about October 17, 2006 at his former salary of $150,000, with benefits, reinstated effective October 1, 2006. His employment record originally indicated that he was hired as "VP Operations", but Thiemer changed the designation to the lesser position of "Manager" Operations.

[71] The judge found that the scope of Nardulli's duties on his return to work was unclear and that he was effectively Thiemer's personal assistant or courier. This finding is contrary to Nardulli's pleading in which he described himself as an "executive" and claimed that he performed the duties of Vice-President Operations for 15 years. It is also contrary to Nardulli's evidence that his duties upon returning to C-W remained the same as they had been prior to his termination in January 2006. The evidence of C-W was to the same effect. The judge's erroneous finding is also at odds with the manner in which she assessed the notice period. Contrary to her finding that Nardulli was Thiemer's "courier", she assessed the notice period in part on the basis that "he held a senior management position with a supervisory role".

[72] C-W appeals the finding that it did not have sufficient cause to dismiss Nardulli. It bases this argument partly on the judge's finding that Nardulli essentially performed the duties of a courier and that this implicitly meant that he was not fulfilling his duties as a manager. However, the judge's erroneous finding cannot be determinative of the issue of whether Nardulli was performing his duties as manager of operations, nor the issue of whether his misconduct warranted dismissal.

[73] C-W alleged an array of grounds for just cause from the date of his rehiring in 2006, including unauthorized absences; failing to fulfill job responsibilities of a senior manager; bullying and harassing other employees; failing to co-operate in a company-wide audit following the theft of equipment; and viewing and storing pornographic material on C-W's computer.

[74] The judge reviewed in extensive detail the evidence of C-W's allegations and parties' respective positions as to each of the alleged grounds of cause (63 pages of the reasons were devoted to this review).

[75] C-W's fundamental argument is that the judge considered each of the grounds of just cause in isolation and thereby failed to have due regard to the cumulative effect of Nardulli's misconduct: see *Atkinson v. Boyd, Phillips & Co*. (1979), 9 B.C.L.R. 255 (C.A.), where this court allowed an appeal on that basis.

[76] I am not persuaded the judge failed to consider Nardulli's pre-2006 misconduct or the alleged misconduct following his rehiring. A careful review of her reasons show that while she did indeed consider each of the grounds of alleged cause, she did so to determine the individual merit of each ground. As I have said, she reviewed the evidence thoroughly and ultimately concluded that the "totality of the evidence" did not support a finding of just cause (at para. 414). That conclusion signifies that all of Nardulli's alleged misconduct was taken into account. These are findings of fact that deserve deference.

[77] Furthermore, the judge's findings in this respect rested in large measure on the credibility of witnesses. It is well established that an appellate court will not interfere with such findings absent palpable and overriding error: *Lensen v. Lensen*, [1987] 2 S.C.R. 672. I am not persuaded that the judge erred as alleged. She had ample opportunity to consider Nardulli's misconduct. She concluded it did not rise to the level of just cause, a finding that was available on the evidence. In substance, C-W's arguments on appeal amount to an invitation for us to retry the case which is, of course, not the appellate function. I would not accede to this ground of appeal.

Special Costs

[78] Nardulli cross-appealed, alleging the judge erred in failing to award him special costs. His claim to special costs was based on the ground that C-W had, as the judge noted in her reasons, filed voluminous material" and "left no stone unturned" (at para. 5). The trial judge also issued separate reasons on the matter of costs: 2013 BCSC 441.

[79] We indicated at the hearing of the appeal that the appeal from the order dismissing special costs could not succeed. The judge heard many days of evidence and produced extensive reasons for judgment. She heard argument on the costs issue but concluded "this isn't a case, in my view, that merits an award of special costs. It was a hard fought case", but did not exhibit conduct that was scandalous or reprehensible.

[80] It is settled law that costs awards are highly discretionary and deserve appellate deference. An appellate court should set aside a costs award only "if the trial judge has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27, [2004] 1 S.C.R. 303. I am not persuaded the judge erred in principle or failed to exercise her discretion.

[81] I would not accede to the cross-appeal relating to the special costs issue.

Summary

[82] I would allow the appeal from the award in respect of profit sharing. I would dismiss the appeal from the award with respect to damages for wrongful dismissal. I would dismiss the cross-appeal in respect of the claim to special costs.

[83] As success has been divided, I would order that each party bear their own costs of the appeal. I would not disturb the award of trial costs.

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Harris"