Case & Statute Comments

Corporate Law—Shareholder Breach of Fiduciary Duty in Close Corporations

Brodie v. Jordan, 447 Mass. 866 (2006)

Introduction

The Supreme Judicial Court ("SJC") recently caught the attention of corporate lawyers and litigators alike with its decision in *Brodie v. Jordan*.[1] The decision represents a retreat from the SJC's seminal, 1975 decision in *Donahue v. Rodd Electrotype Co. of New England, Inc.*,[2] which recognized a direct right of action between shareholders of a close corporation, and broad equitable relief, for breach of the fiduciary duty of utmost good faith and loyalty ("freeze-out" claims)[3]. Freeze-outs are characterized by a controlling shareholder's oppressive conduct, aimed at depriving a minority owner of the benefits of stock ownership.[4] The *Donahue* court employed its broad equitable power to remedy a freeze-out by ordering that the minority's shares be purchased on terms as favorable as those which the controlling shareholders offered to another shareholder.[5]

Since *Donahue*, Massachusetts courts have employed equitable remedies on behalf of minority shareholders who have fallen victim to a freeze-out.[6] As has been observed, "[n]owhere has Massachusetts' time-honored equity practice been more creatively employed, and nowhere does it enjoy greater continued vitality, than in the area of internecine disputes, in closely held corporations."[7] *Brodie v. Jordan*, however, seems to have put an end to such creative equity. Even though the SJC adopted lower courts' findings that controlling, majority shareholders had breached a fiduciary duty to Mary Brodie, a minority shareholder of a close corporation, the SJC found that she was not entitled to a forced buyout of her shares as ordered by the trial court and affirmed by the Appeals Court.[8] Extending the "reasonable expectations" analysis previously used to determine a majority owner's liability for breach of fiduciary duty, the SJC relied on Mary Brodie's "reasonable expectations" to undo the buyout remedy ordered by the lower courts.[9] In rejecting the buyout, the SJC concluded that Brodie had no reasonable expectation that the company would purchase her shares and, in the absence of any such expectation, found that the buyout granted to Brodie a windfall by creating an "artificial market" for her shares.[10]

By adopting a "reasonable expectation" standard for both assessing liability and determining the scope of equitable relief available in freeze-out disputes, the SJC is arguably in line with the current trend in other jurisdictions.[11] This standard offers some doctrinal clarity in an area of law typified by varied and occasionally inconsistent remedies. It also has an undeniable logical appeal, purporting to ensure that remedies for freeze-out behavior will be "proportional to the breach."[12] One must ask, however, whether such limits on the courts' equity power will deprive them of the capacity to implement practical remedies that truly make an aggrieved shareholder whole, and whether it will end corporate battles which might otherwise continue for years. Under *Brodie*, courts will no longer have broad equitable discretion to extricate shareholders from untenable, mutually destructive corporate relationships, even when, as appeared to be the case in *Brodie*, to do so represents the most practical and fair approach to resolving a freeze-out dispute. On the other hand, parties who no longer can rely on the courts to resolve such disputes with finality may, and should, take more care to protect themselves when investing in a close corporation. This comment explores the evolution of the reasonable expectation standard announced in *Brodie* and considers its practical impact in freeze-out cases.

I. *Brodie v. Jordan*

Malden Centerless Grinding Inc. was organized in 1973 by Walter Brodie, the plaintiff's late husband, David Barbuto, a defendant, and Guy Agri.[13] The company is a closely-held corporation, meaning that: it has "(1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation."[14] Robert Jordan, a co-defendant, was hired in 1975.[15]

1. 447 Mass. 866 (2006).
2. 367 Mass. 578 (1975).
3. *Id*. at 593.
4. *Id*. at 588.
5. *Id.* at 603.
6. *See, e.g.*, Hallahan v. Haltom Corp., 7 Mass. App. Ct. 68 (1979).
7. Thomas P. Billings, *Remedies for the Aggrieved Shareholder in a Close Corporation*, 81 Mass. L. Rev. 3, 3 (1996).
8. Brodie v. Jordan, 447 Mass. 866, 867 (2006).
9. *Id*. at 870-71.
10. *Id.* at 872.
11. 2 F. Hodge O'Neal & Robert B. Thompson, O'Neal and Thompson's Close Corporations and LLCs: Law and Practice § 9:29 (3d ed. 1996).
12. *See* Brodie, 447 Mass. at 873.
13. Brodie v. Jordan, 66 Mass. App. Ct. 371, 372 (2006).
14. *Brodie*, 447 Mass. at 868-69 (citing Donahue v. Rodd Electrotype Co. of New England, Inc., 367 Mass. 578, 586 (1975)).
15. *Brodie*, 66 Mass. App. Ct. at 372.

In 1979, Agri resigned and sold his shares to the company.[16] Upon Agri's resignation, Walter Brodie became president.[17] From 1979 until 1984, Brodie and Barbuto were the company's sole shareholders.[18] In 1984, Jordan became a shareholder, resulting in Barbuto, Walter Brodie and Jordan each owning 400 shares.[19]

Sometime prior to 1989, Walter Brodie became largely inactive, and in 1989, he attempted to sell his shares to the company through the presentation of a draft purchase agreement, proposing a price of $145,000, which Jordan refused.[20] Intermittently, Walter Brodie made other requests for the company to purchase his shares, all of which were rejected.[21]

As a result of ongoing friction between Walter Brodie and Jordan, Jordan and Barbuto voted to remove Brodie as an officer and director in 1992.[22] From then until his death in 1997, Walter Brodie had only limited involvement with the company: he received notices of annual meetings, but did not attend;[23] he held no offices, and other than consultant's fees that he was paid in 1994 and 1995, he received no payments from the company;[24] he met with Jordan and Barbuto two or three times a year.[25]

After Walter Brodie's death, his wife, Mary Brodie, inherited his 400 shares and became executrix of his estate.[26] Soon after, Brodie nominated herself for election as a director, to fill the seat left vacant by her husband, but her effort was defeated by Jordan and Barbuto.[27] She also requested financial information about the company, including a request for a valuation of her shares.[28] Jordan and Barbuto failed to honor those requests as well.[29]

In February 1998, having not received the financial information she requested, Mary Brodie filed a complaint in superior court alleging, *inter alia*, the defendants' breach of fiduciary duty to her.[30] Eight months later, in October of 1998, Brodie notified the corporation that she wished to sell her shares, requesting $205,000 and invoking the valuation process set forth in the articles of organization (a process the defendants abandoned after an unsuccessful attempt at mediation).[31]

Finding that the majority owners had breached their fiduciary duties by freezing Brodie out of the company, and for the purpose of placing "the plaintiff in the position she would have been in if there had been no wrongdoing," the trial court ordered the defendants to purchase her shares.[32] When the parties could not agree on a price, the trial court awarded Brodie damages in the amount of $94,500.[33] Defendants appealed.

The Appeals Court affirmed both the trial court's finding that the plaintiff had been wrongfully frozen out and its order requiring purchase of the plaintiff's shares.[34] The Appeals Court also found that Barbuto and Jordan's receipt of numerous financial and operational benefits from their ownership interests, while denying any such benefits to Mary Brodie, further demonstrated a freeze-out.[35] Finally, the Appeals Court agreed that the defendants had hindered the plaintiff's ability to sell her shares to a third party by their refusal to participate in the mandatory valuation process set forth in the articles of organization.[36] As a result of defendants' refusal to participate in a stock valuation, and in recognition of the already questionable marketability of Brodie's shares, the Appeals Court concluded that the plaintiff had wrongfully been denied "a true opportunity to dispose of her shares."[37] Affirming the court-ordered buyout, the Appeals Court rejected the defendants' argument that the remedy created a windfall for the plaintiff, stating that anything less would have merely returned the plaintiff "to the isolated position she found herself in before … without corporate office and promised only annual, unaudited financial statements."[38] This, of course, is where the SJC disagreed.[39]

In reviewing the Appeals Court's ruling, the SJC drew upon the "reasonable expectations" standard it had employed 30 years earlier to determine liability for a freeze-out in *Wilkes v. Springside Nursing Home, Inc.*[40] Extending the reasonable expectation standard to the question of remedy, the *Brodie* court stated:

> Because the wrongdoing in a freeze-out is the denial by the majority of the minority's reasonable expectations of benefit, it follows that the remedy should, to the

16. Agri first offered his shares to the corporation for the price of $50,000; the parties negotiated a final price of $25,000. *Id*. at 384 n.18.

17. *Id*. at 372.

18. *Id*.

19. *Id*. at 372 n.4.

20. *Id*. at 372.

21. *Id*. at 372, 384 n.18.

22. *Id.* at 373.

23. *Id*.

24. Brodie v. Jordan, 447 Mass. 866, 868 (2006).

25. *Id*. at 867; *Brodie*, 66 Mass. App. Ct. at 373.

26. *Brodie*, 66 Mass. App. Ct. at 373.

27. *Id*.

28. *Id*.

29. *Id.*; *see Brodie*, 447 Mass. at 870 n.4.

30. *Brodie*, 66 Mass. App. Ct. at 373.

31. *Id*.

32. *Id*. at 384. The defendants' refusal to accept the plaintiff's self-nomination as a director, refusal to provide plaintiff with requested financial information, and refusal to either purchase plaintiff's shares or participate in a valuation of her shares, thereby preventing her from offering them for sale to a third party, all contributed to the court's conclusions concerning liability. *Id*. at 376-83.

33. *Id*. at 374.

34. *Id*. at 388.

35. *Id*. at 379 n.12. Jordan received a salary from the corporation, participated in a profit-sharing plan, and had use of a company car. Barbuto received director's fees until 1998, was paid rent by the corporation for a building he owned and rented to the corporation, and enjoyed an open line of credit for another, independently-owned business that was a customer of the company. Brodie v. Jordan, 447 Mass. 866, 868 (2006).

36. *Brodie*, 66 Mass. App. Ct. at 383-84.

37. *Id*. at 382.

38. *Id*. at 385.

39. *Brodie*, 447 Mass. at 871-72.

40. 370 Mass. 842 (1976).

> extent possible, restore to the minority shareholder those benefits which she reasonably expected, but has not received because of the fiduciary breach.[41]

The court then concluded that Mary Brodie had no reasonable expectation that her shares would be purchased by the corporation, and that the buyout remedy, by creating an "artificial market" for her shares, placed her in a better position than she would have enjoyed absent the wrongdoing.[42] In support of its finding, the court stated: "[t]here is nothing in the background law, the governing rules of this particular close corporation, or any other circumstance that could have given the plaintiff a reasonable expectation of having her shares bought out."[43] Although the court never said so explicitly, it apparently concluded that under these circumstances, the buyout constituted an abuse of the trial court's discretion, which is the standard of review for equitable remedies.[44]

The SJC remanded the case for a further determination of the plaintiff's reasonable expectations, whether they were frustrated, and if so, how those interests could be vindicated.[45] The court instructed that money damages would be the appropriate remedy for quantifiable deprivations and that injunctive relief may be appropriate "to ensure that the plaintiff is allowed to participate in company governance, and to enjoy financial or other benefits from the business, to the extent that her ownership interest justifies."[46] While on remand, the case was settled and dismissed by the parties.

II. The Reasonable Expectation Standard

A. Evolution in Massachusetts

Brodie's reasonable expectation standard for determining a remedy is the traditional basis for judicial analysis of *liability* in freeze-out cases. The seeds of the reasonable expectation standard were planted in *Donahue*, although the more groundbreaking aspects of the decision have until now overshadowed this fact. The plaintiff in *Donahue* was a non-family member shareholder in a largely family-owned corporation.[47] In an effort to convince their father to retire, the sibling-shareholders, who collectively owned a controlling interest in the company, negotiated an agreement for the corporation to purchase their father's shares for $800 per share.[48] The plaintiff was unaware of this transaction until she was asked to vote to ratify it at the following annual meeting.[49] She refused, and soon thereafter offered her shares to the corporation for the same price paid to the father.[50] The corporation, in turn, refused her offer, and the plaintiff sued, claiming an unlawful distribution of corporate assets.[51]

Recognizing the duty of "utmost good faith and loyalty" by majority to minority shareholders of close corporations[52], the Donahue court concluded:

> [I]f the stockholder whose shares were purchased was a member of the controlling group, the controlling stockholders must cause the corporation to offer each stockholder an equal opportunity to sell a ratable number of his shares to the corporation at an identical price ....The controlling group may not, consistent with its strict duty [of utmost good faith and loyalty] to the minority, utilize its control of the corporation to obtain special advantages and disproportionate benefit from its share ownership.[53]

This conclusion, however, came with a caveat. Such unequal treatment of stockholders in stock purchases would be acceptable when "all other stockholders give advance consent to the stock purchase arrangements through acceptance of an appropriate provision in the articles of organization, the corporate by-laws or a stockholder's agreement."[54] The *Donahue* holding suggested early on that a minority shareholder may enforce only those expectations that are defined by the parties' intentions and agreements, as evidenced by the majority's conduct, the parties' course of dealings and governing corporate documents.

The *Donahue* court remanded for entry of an order that either the plaintiff be given the equal opportunity to sell her shares to the corporation under the same terms granted to the favored shareholder, or that the favored shareholder reimburse the corporation for the purchase price of his shares, with interest.[55] Although it is unknown which of the two remedies were imposed on remand, *Donahue* has since stood for the proposition that it is within the court's equitable powers to order a corporation to purchase a minority shareholder's ownership interest.[56]

A year later, in *Wilkes v. Springside Nursing Home, Inc.,*[57] the SJC explicitly made the connection between a minority shareholder's expectations of benefit from stock ownership and the majority's

41. *Brodie*, 447 Mass. at 870-71.

42. *Id*. at 871-72. The court readily distinguished the facts in this case from those in *Donahue v. Rodd Electrotype Co. of New England, Inc. Id*. at 872 n.5.

43. *Id.* at 872.

44. *Demoulas v. Demoulas*, 428 Mass. 555, 589 (1998) (citing Bodio v. Ellis, 401 Mass. 1, 10 (1987)).

45. *Brodie*, 447 Mass. at 873.

46. *Id*. at 873-74.

47. Donahue v. Rodd Electrotype Co. of New England, Inc*.,* 367 Mass. 578, 581-84 (1975).

48. *Id*. at 583.

49. *Id*. at 584.

50. *Id*.

51. *Id*. at 584-85.

52. *Id*. at 593.

53. *Id.* at 598.

54. *Id*. at 599 n.24 (citing Brown v. Little Brown & Co., 269 Mass. 102 (1929)).

55. *Id*. at 603-04. Note that it was the latter option which plaintiff requested in her complaint. *Id*. at 603.

56. *See, e.g*., Brodie v. Jordan, 66 Mass. App. Ct. 371, 385 (2006); Keating v. Keating, Nos. 00749, 00748, 2003 WL 23213143, at *18 (Mass. Super. Ct. Oct. 3, 2003).

57. 370 Mass. 842 (1976).

liability for acting to frustrate those expectations:

> At a minimum, the duty of utmost good faith and loyalty would demand that the majority consider that their action [in terminating the minority's employment] was in disregard of a long-standing policy of the stockholders that each would be a director of the corporation and that employment with the corporation would go hand in hand with stock ownership.[58]

The court further observed that Wilkes, the minority shareholder, had "invested his capital and time for more than 15 years *with the expectation* that he would continue to participate in corporate decisions."[59] This reference to the minority shareholder's expectations, together with the court's earlier analysis in *Donahue*, began to frame the standard that was expressly articulated some 30 years later, in *Brodie*.

Since *Donahue* and *Wilkes*, the courts have had numerous occasions to employ their broad equitable powers to fashion remedies in freeze-out disputes. A review of these cases reveals that generally, though not always, the courts have anchored their analyses in the notion that liability and, to a lesser extent, remedy, should be defined by the minority's reasonable expectations of benefit from stock ownership.[60] The best-known example in recent history is the superior court's decision in *Demoulas v. Demoulas*.[61]

The *Demoulas* litigation included a direct action by the widow and children of George Demoulas, who owned shares in a closely held family corporation. The action was brought against his surviving brother, Telemachus Demoulas, his children and the corporation.[62] The jury found that Telemachus Demoulas, through a number of actions, had violated his fiduciary duties to the plaintiffs so as to increase his control in the corporation from 50 percent to 92 percent.[63]

Following the jury's finding, a superior court judge rescinded certain fraudulent stock transfers by Telemachus Demoulas, divested the defendants of ownership interests in another company to restore the balance of control that had existed before the deceased brother's death, and removed Telemachus Demoulas from the board of directors of the family corporation.[64] The court stated: "[r]escission is the only remedy that accomplishes equity's mission of fairness while fulfilling plaintiffs' *reasonable expectations*. The court recognizes the meaningful expectations that plaintiffs have in their ownership rights in [the company], and the right to participate in its management."[65] The SJC affirmed on direct appellate review.[66]

Likewise, in *Bodio v. Ellis*,[67] the court looked to the understanding and intentions of the parties, as evidenced by their stock purchase agreement and prior conduct, to conclude that the minority had a reasonable expectation that he and another shareholder would be on equal footing in terms of ownership interest, employment and control of the corporation.[68] The court, therefore, ordered the majority to relinquish that portion of his shares that would leave him with an ownership interest equal to the minority's position.[69]

The plaintiff's reasonable expectations were explicitly discussed for the first time in *Merola v. Exergen Corp*.[70] As in *Wilkes*, the plaintiff in *Merola* was a minority shareholder terminated from his employment in the corporation.[71] The employment relationship began in conjunction with a private stock offering, which the plaintiff accepted.[72] The plaintiff was told that if he invested in the corporation and accepted its offer of employment, "he would have the opportunity to become a major stockholder in the corporation and to have continuing employment with the corporation."[73] These promises, the court concluded, established "reasonable expectations that [the plaintiff] would receive a return in his investments with continued employment and with opportunities to become a major shareholder of [the company]."[74]

In the more recent case of *Leslie v. Boston Software Collaborative,*[75] a freeze-out in which the controlling shareholders removed the minority shareholder from the board of directors and terminated his employment (based upon the exceedingly hostile and disruptive conduct by the minority owner), the superior court followed the "reasonable expectations" approach to crafting a remedy without describing it as such. Although finding that the majority's conduct was unlawful and that the parties' relationships were "broken beyond repair,"[76] the court declined to order a buyout of the minority's shares, finding that, unlike *Donahue*, no other stockholders had received monetary benefit from the sale of their shares.[77] To order

58. *Id*. at 852-53.

59. *Id.* at 853 (emphasis added).

60. *See, e.g.*, Bodio v. Ellis, 401 Mass. 1 (1987); Hallahan v. Haltom Corp., 7 Mass. App. Ct. 68 (1979); Leslie v. Boston Software Collaborative, Inc., No. 010268BLS, 2002 WL 532605 (Mass. Super. Ct. Feb. 12, 2002); Demoulas v. Demoulas, No. 90-2344, 1996 WL 511519, at *4 (Mass. Super. Ct. Aug. 20, 1996) (amended Oct. 1, 1996), *aff'd in part, vacated in part and remanded*, 428 Mass. 555 (1998).

61. *Demoulas*, 1996 WL 511519 at *9-10.

62. *Demoulas* 428 Mass. at 557.

63. *Id.*

64. *Demoulas*, 1996 WL 511519, at *9-10.

65. *Id.* at *5 (emphasis added).

66. *Demoulas*, 428 Mass. at 591-92.

67. Bodio v. Ellis, 401 Mass. 1 (1987).

68. *Id*. at 8-9.

69. *Id*. at 10.

70. Merola v. Exergen Corp., 38 Mass. App. Ct. 462, 468 (1995).

71. *Id*. at 462-63.

72. *Id*. at 467-68.

73. *Id*. at 468.

74. *Id.*

75. Leslie v. Boston Software Collaborative, Inc., No. 010268BLS, 2002 WL 532605 (Mass. Super. Ct. Feb. 12, 2002).

76. *Id*. at *9.

77. *Id.* at *8.

a buyout, the court concluded, would not be "a proper equitable resolution,"[78] presumably because nothing in the parties' prior course of dealings allowed the conclusion that the plaintiff might expect his shares to be bought. Ultimately, in addition to money damages designed to make the plaintiff whole for his loss of employment, the corporation was ordered to reinstate the plaintiff as a director to allow him to participate in the corporation's management, despite a history of bellicose behavior which one might have expected to warrant permanent separation from his co-owners.[79]

B. Application of the Reasonable Expectation Standard

Although the SJC's opinion in *Brodie* suggests that governing corporate documents, past conduct on the part of controlling shareholders, and the parties' course of dealings can offer clues to the minority's expectations of benefit from stock ownership,[80] many questions remain to be answered about how such expectations are to be proved and what evidence renders them deserving of judicial protection. For example, in finding that Mary Brodie possessed no expectation that her shares would be purchased by the corporation, the court seems to have ignored the fact that the company had previously purchased the shares of Agri, another co-founder, when he resigned.[81] The court offered no rationale for why this fact did not give rise to some expectation on the part of both Mary Brodie and her husband that when he left the company's employment, his interests would likewise be purchased by the corporation.

Some guidance on the definition of "reasonable expectations" in the freeze-out context can be gleaned from other jurisdictions, including the oft-cited case *In re Kemp & Beatley, Inc.*,[82] in which the court held that "oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture."[83] This definition, however, leaves open the question of whether a remedy fairly can be determined by applying the same standard. It also leaves unanswered how such intentions can be divined after the death of the original shareholder, and whether one's reasonable expectations pertaining to stock ownership might develop over time, as the relationship evolves.

Mary Brodie, for example, came into her ownership as an inheritance. She never worked at the company or had the least involvement in its affairs, save any information her husband chose to share with her during their marriage. By limiting Brodie's relief to her expectations of benefit from her ownership interest, the SJC seems to be assuming a relationship, or at the very least, some mutual understanding, that never existed. One must question how, in such circumstances, a theoretical framework based on the minority's "reasonable expectations" can fairly redress indisputably unlawful and oppressive conduct, particularly when visited upon those who succeed to stock ownership by death, divorce, foreclosure of a lien or a gift.

C. Reasonable Expectations Versus Practicality and Fairness

Ever since *Donahue*, the courts have struggled with the tension between the need for broad equitable relief to stop oppressive conduct by those controlling a close corporation and the potential that such relief will overextend judicial oversight of private corporate conduct and "unduly hamper [the corporation's] effectiveness in managing the corporation in the best interests of all concerned."[84] The reasonable expectation standard announced in *Brodie* appears intended to limit a court's involvement in those affairs in a manner tailored to the corporation's own established practices. These limits, however, inevitably come at some cost.

The decision in *Keating v. Keating*[85] illustrates a fundamental problem in limiting freeze-out remedies, especially that of the buyout, to those for which the minority shareholder can demonstrate some reasonable expectation. *Keating* involved a family dispute in which a father, the majority owner of the company, terminated his minority owner son's employment after a series of episodes in which the son found himself increasingly at odds with his father and sister, another employee.[86] Although recognizing that the minority owner, by virtue of his ownership interest, possessed a reasonable expectation of continued employment,[87] the court made no findings about his expectations concerning the redemption of his shares upon his departure from the company.[88] In fact, the evidence recited by the court suggested the contrary, that the parties had no such expectations.[89] Nevertheless, the court reasoned, "[i]n many situations the only fair and practical remedy is a court-ordered buyout of the minority shares by the majority."[90]

Deciding that reinstating the minority shareholder to his former employment and to the board of directors would be ineffective, owing both to the parties' inability to tolerate one another and to the fact that the minority shareholder had begun another business venture, the court ordered the majority owner to purchase the minority's shares.[91] This remedy appeared to have been the only practical and fair means

78. *Id.*

79. *Id*. at *9.

80. Brodie v. Jordan, 447 Mass. 866, 872 (2006).

81. Brodie v. Jordan, 66 Mass. App. Ct. 371, 372 (2006).

82. In re Kemp & Beatley, Inc., 473 N.E.2d 1173 (N.Y. 1984).

83. *Id.* at 1179.

84. Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 850-851 (1976) ("the controlling group . . . must have some room to maneuver in establishing the business policy of the corporation"); *see also* Goode v. Ryan, 397 Mass. 85, 92 (1986) ("It is not the proper function of this court to reallocate the risks inherent in the ownership of corporate stock in the absence of corporate or majority shareholder misconduct.").

85. Keating v. Keating, Nos. 00749, 00748, 2003 WL 23213143 (Mass. Super. Ct. Oct. 3, 2003).

86. *Id.* at *13.

87. *Id.* at *15.

88. *Id.* at *18.

89. *Id.*

90. *Id*.

91. *Id.*

of adequately compensating the minority owner for his ownership interest while bringing to a close the parties' dispute. There appears little doubt, however, that such a remedy, in these circumstances, would not be upheld under the *Brodie* standard, because nothing in the parties' past dealings or the corporation's governing documents established a policy or practice of purchasing a departing shareholder's stock.

As was observed some years before the *Brodie* decision, "[i]n a shareholder oppression context, this equitable parting [a buyout] may be necessary for an effective resolution of the dispute. Alternative remedies … are often inadequate in a shareholder oppression context."[92] Because a close corporation, by definition, involves a small number of shareholders involved in its management and operations, it is inevitable that when conflicts arise involving breaches of fiduciary duty, relationships may be damaged beyond repair. In this context, it is naïve to impose a remedy that requires embittered parties to continue to deal with one another. "To put it bluntly, it … is futile to expect a closely held corporation to operate smoothly when a shareholder has been frozen out, litigation has ensued, and the court has compelled the shareholder's return."[93] In *Brodie*, for example, the court suggested that the lower court, on remand, consider ordering the payment of dividends as a remedy.[94] This recommendation fails to take into account the likelihood that the parties will continue to spar over the timing and amount of dividends, requiring continued judicial intervention and oversight.[95]

After the SJC remanded *Brodie*, the parties were compelled to expend substantial additional resources to determine whether, and to what extent, the defendants had wrongfully diverted to themselves corporate profits, necessitating the initiation of another evidentiary hearing, including the use of experts, and further proposed findings of fact and conclusions of law.[96] Because corporate dividends are contingent upon a company's ongoing financial performance, it is not improbable that a court might be called upon unendingly to referee such disputes. If the problem sought to be prevented by the court's decision in *Brodie* is excessive judicial involvement in corporate affairs, then this cannot have been the outcome the court intended.[97]

Neither can monetary damages be counted upon in every instance to "restore to the minority shareholder those benefits which she reasonably expected, but has not received because of the fiduciary breach."[98] As Douglas K. Moll has observed:

> [A]ssume that the [minority] shareholder's expectation of employment was the only expectation that was frustrated by the majority's actions. From a damages standpoint, a court could award conventional wrongful termination damages such as back pay and, in appropriate cases, front pay…. Given the track record of oppressive majority behavior, however, the damage award is arguably inadequate, as it leaves the other aspects of the shareholder's investment bargain (e.g. management role, dividends) subject to the majority's control.[99]

This appeared to be the shortcoming in the relief awarded in the 2002 decision of *Leslie v. Boston Software Collaborative*, *Inc.*, in which the court stated the minority's "participation as an employee is, like the fallen egg, broken beyond repair."[100] Given the absence of evidence that the minority could reasonably expect to have his shares purchased, the court declined to order a buyout.[101] Accordingly, the corporation was ordered to pay damages to the minority to compensate him for his lost salary.[102] Inexplicably, however, the court also ordered the minority's reinstatement to the board of directors, purportedly to allow him to participate in the corporation's management.[103] The futility of such an order, given the court's own findings about the parties' relationship, leads one to wonder why, if the aim of remedies for oppressive shareholder conduct is to make the plaintiff whole and to resolve the underlying dispute, a buyout was not regarded to be the only fair and practical remedy available under the circumstances.

Conclusion

Proper assessment of a shareholder's reasonable expectations in fashioning remedies in freeze-out disputes appears to ensure that courts do not overextend themselves in corporate management and decision making. The *Brodie* case does not guarantee that result. Also, limiting the equitable discretion of trial courts in such cases may not secure a just outcome.

Ordering the purchase of the minority's shares, where the controlling shareholder or group has unlawfully deprived the minority

92. Douglas K. Moll, *Reasonable Expectations v. Implied-In-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?*, 42 B.C. L. Rev. 989, 1019 (2001).

93. *Id.* (internal quotation omitted).

94. Brodie v. Jordan, 447 Mass. 866, 874 (2006).

95. It is curious that the court contemplated the payment of dividends in light of the fact that the corporation had never before declared dividends, nor did the corporate documents require it to do so. Mary Brodie could not have reasonably expected to receive dividends any more than she could have expected to have her shares purchased.

96. Brodie v. Malden Centerless Grinding, Inc. (Middlesex Superior Court, Docket No. MICV1998-00518).

97. A further wrinkle here is that declaration of dividends is within the province of the corporation, and is not a remedy that historically has been available against individual shareholders. *See* Crowley v. Commc'ns. For Hosps., Inc., 30 Mass. App. Ct. 751, 767 (1990).

98. *Brodie*, 447 Mass. at 871.

99. Moll, *supra* note 92, at 1020-21.

100. Leslie v. Boston Software Collaborative, Inc., No. 010268BLS, 2002 WL 532605, at *9 (Mass. Super. Ct. Feb. 12, 2002).

101. *Id.* at *8.

102. *Id.* at *10.

103. *Id.* at *11.

of the benefits of ownership, is often the only fair and practical means of resolving such disputes.

The facts of *Brodie v. Jordan* confronted the court with an added complication: How can the reasonable expectations of a party who inherited shares in a close corporation be determined? In many close corporations, the original investor makes decisions as to corporate involvement based on that person's knowledge, expertise, employment needs and personal relationships. It is unlikely that a successor by death, gift, divorce or any non-negotiated event is privy to the original owner's understandings and expectations. In such circumstances, the reasonable expectation standard seems an effort to fit a square peg into a round hole.

In light of *Brodie*, owners of close corporations must take steps to prepare for the death of shareholders and other events (such as deadlock over management) that can more efficiently and less disruptively be resolved without broad judicial intervention. Options include purchasing key man life insurance policies designed to buy out a deceased shareholder, including repurchase provisions within governing corporate documents and drafting employment agreements or other agreements that contemplate the departure of shareholders from the company.[104] Through careful preparation, the parties can avoid some of the disentanglement problems raised by *Brodie*.

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104. For further discussion of reasonable expectations upon transfer of shares and/or changed expectations, see Douglas K. Moll, *Shareholder Oppression and Reasonable Expectations: of Change, Gifts, and Inheritances in Close Corporation Disputes*, 86 Minn. L. Rev. 17 (2002).