

## Appeals court affirms decision on Lund fortune

### Sibling's buyout could pay for a lot of groceries

By Dan Heilman

Special to Minnesota Lawyer

If you've found yourself captivated by the squabbling over the Lund family grocery fortune, stay tuned: There might be more fighting to come.

In an opinion published last week, the Minnesota Court of Appeals affirmed an earlier decision by the Hennepin County District Court holding that Kim A. Lund may negotiate a buyout for her share of the Lund estate with her estranged siblings.

Kim Lund, the eldest of four Lund siblings who equally own the Lunds & Byerlys grocery chain, had in 2014 sued Lunds and its CEO — her brother Russell “Tres” Lund III — to cash out of the company, which also has real estate holdings. She sought damages, a buyout of her interests, removal of Tres Lund and Stanley Rein as trustees of her trusts, attorney fees, expenses, and other relief.

In July 2016, her buyout motion was granted in Hennepin County District Court. The trial court denied Tres Lund's summary-judgment motion on Kim's claims of unfairly prejudicial conduct and equitable relief claims, but did grant summary judgment motion on her claims of breach of fiduciary duty and civil conspiracy claims.

Following a five-day trial in 2017, Hennepin County Chief Judge Ivy Bernhardson awarded Kim Lund \$45.2 million for her stake in the chain, roughly splitting the difference between than the \$80 million she had sought and the \$21.3 million she had been offered. Tres Lund, who now is the only one of the four Lund siblings still involved in the family business, appealed.

#### Equitable remedy?

The Court of Appeals was asked to decide whether the District Court should have granted the buyout, determined

fair value, shot down the breach-of-fiduciary-duty claims and other issues.

Tres Lund's main argument on appeal was that the District Court erred as a matter of law in granting Kim's buyout motion. Lund and his co-appellants maintained that a decision on a buyout motion is akin to summary judgment or a directed verdict and is therefore subject to de novo review. Kim Lund argued that the proper standard of review is abuse of discretion because a buy-out is an equitable remedy.

Under the Minnesota Business Corporation Act and the Minnesota Limited Liability Company Act, a District Court “may grant any equitable relief it [finds] just and reasonable in the circumstances” if individuals in control of the corporation or LLC have acted “in a manner unfairly prejudicial” toward another shareholder or member.

Thus, the District Court concluded it is appropriate to grant a buyout on motion if the record reflects at least one uncontroverted incident of unfairly prejudicial conduct. The Court of Appeals agreed, saying that if it's firmly established that prejudicial conduct occurred, a District Court may grant a buyout without conducting an evidentiary hearing.

The court found no evidence disputing that whether Kim Lund's siblings frustrated her reasonable expectations of liquidity and financial independence.

The court also took note of the fact that Kim Lund had been looking to get out of the family business since the early 1990s. The District Court identified 14 documents dating back to 1992 that indicated her desire for an “exit strategy” and an understanding among the parties that such a strategy was in the process of being implemented.

The Court of Appeals disagreed with the appellants' contention that Kim Lund's expectations were unreasonable because they conflicted with transfer-restriction agreements, trust instruments, bylaws, and the Minnesota Business Corporation Act.

Regarding Kim Lund seeking a buyout, the Court of Appeals agreed with the lower court that she was in a vulnerable position as a minority shareholder in that she lacked management rights and did not participate in the creation of trust instruments or corporate-governance documents — hence, the need for a buyout order crafted by the District Court.

Tres Lund et al. argued that the grant of a buyout could discourage close corporations from accommodating or even discussing a shareholder's request, because any consideration could later be found to establish the shareholder's reasonable expectations.

“We are not persuaded,” wrote Judge Louise D. Bjorkman in her opinion. “A district court is in the best position to evaluate and balance the equities on the record before it. Under the circumstances of this case, the district court did not abuse its discretion in granting a buyout of Kim's interests as an equitable remedy for unfairly prejudicial conduct.”

Tres Lund's lawyer, Steve Wells of Dorsey & Whitney, said he expected that the court would affirm the lower court on the breach-of-fiduciary-duty claim.

“But we were surprised and disappointed with the court's decision on the availability of the buyout remedy,” he added, noting that his client is weighing his options regarding a further appeal.

Janel M. Dressen, who represented Kim Lund on behalf of Anthony Ostlund Baer & Louwagie, said the Court of Appeals properly deferred to Bernhardson's analysis in granting an equitable buyout.

“The court's published decision provides further support for long-standing Minnesota law providing that the District Courts have discretion to exercise their equitable powers to permanently resolve closely held business disputes based upon the facts and circumstances of each case,” said Dressen.

The case will be sent back to District Court to determine whether Tres Lund can recover attorney fees.