CANADA / JUDGMENT

Callahan v. Callahan

2022 BCCA 387

COURT
British Columbia Court of Appeal

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2022 BCCA 387 Callahan v. Callahan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Callahan v. Callahan,

2022 BCCA 387

Date: 20221118

Dockets: CA48106; CA48108

Docket: CA48106

Between:

Robert Callahan, Bruce Callahan,

and Thomas Lloyd Callahan as trustee for the TLC (AE) SH4 Trust

(now Bruce Callahan as trustee for the Callahan AE #3 Trust)

Appellants

(Respondents)

And

Edward James Callahan

Respondent

(Petitioner)

And

Douglas Callahan, 0081092 B.C. Ltd.

(formerly known as Shasta Properties Ltd.)

and Ernst & Young Inc. (as liquidator)

Respondents

(Respondents)

- and -

Docket: CA48108

Between:

Douglas Callahan

Appellant

(Respondent)

And

Edward James Callahan

Respondent

(Petitioner)

And:

Robert Callahan, Bruce Callahan,

Thomas Lloyd Callahan as trustee for the TLC (AE) SH4 Trust

(now Bruce Callahan as trustee for the Callahan AE #3 Trust),

0081092 B.C. Ltd. (formerly known as Shasta Properties Ltd.),

and Ernst & Young Inc. (as liquidator)

Respondents

(Respondents)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

January 19, 2022 (Callahan v. Callahan, 2022 BCSC 87, Vancouver Docket S2012670).

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Place and Date of Hearing:

Vancouver, British Columbia

October 11, 2022

Place and Date of Judgment with Written Reasons to Follow:

Vancouver, British Columbia

October 11, 2022

Place and Date of Written Reasons

Vancouver, British Columbia

November 18, 2022

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Petitioner "T" and his three brothers (including one brother as a trustee) were each the holders of 25 percent of the shares of a family company ("Shasta"), which owned a prime piece of real estate in Kelowna. The brothers had hoped they would eventually develop this property together. However, they had a long history of disputes and litigation, as illustrated by various legal proceedings and a 14-year arbitration which had been aimed at separating certain other business

interests of T from those of his brothers. In 2020, the three brothers passed a special resolution of Shasta approving the liquidation of its assets and its ultimate dissolution pursuant to s. 319 of the Business Corporations Act. They also appointed a professional liquidator, which proposed to auction Shasta's assets, including the Kelowna real estate. T sought a declaration under s. 227 of the Act that the affairs of Shasta were being conducted in a manner oppressive or unfairly prejudicial to him. Chambers judge below found T (and his brothers) had a "sentimental attachment" to the real estate and that the liquidation of the company would be unfairly prejudicial to him.

Held: Appeal allowed. Chambers judge had erred in law in failing to determine whether viewed objectively and in context, T's expectations were reasonable. Under s. 227, a petitioner's expectations must be reasonable in the corporate context in which they arise. Here, each brother held 25 percent of the shares, meaning that no single member of the family could make decisions concerning the property that were at odds with the wishes of the majority, and that any three brothers (plus the trustee of a family trust) would be in a position to pass a special resolution contrary to the wishes of the fourth brother. The shareholders' expectations in this context had changed and evolved. The breakdown of the family enterprise had led the three brothers to conclude that a future that involved their working together with T to develop the property would result only in further discord and litigation. The idea that the four brothers would cooperate in developing it was now an "impossible dream" and ignored what had become a new status quo in the family -- the separation of T's interests from those of his brothers. In the result, oppression had not been proven. The Court also noted that unfair prejudice would not arise from the liquidation, given that all four brothers would have the opportunity to participate in the auction of the property. The liquidation resolution, previously set aside by the chambers judge, was restored.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] We informed counsel at the end of the hearing of this appeal that it would be allowed. We did so for the reasons that follow. Like the chambers judge below, we will refer to the parties by their first names for the sake of convenience, intending no disrespect.

Factual Background

[2] The four sons of Lloyd and Marjorie Callahan -- Douglas, Edward, Bruce and Robert -- received from their parents what should have been a legacy of financial security that could have been expected to extend into at least the next generation. But while the enterprises they were given have been largely successful, the extreme disaffection that has plagued the relationship between Edward ("Ted") Callahan on the one hand and his three brothers on the other has overshadowed that success.

[3] The Callahan family began developing its substantial assets in the 1950s when the father, Lloyd, launched a trucking business operating in the northern part of the province. Eventually, he branched out into construction and real estate. Beginning when they were

teenagers, each of the four brothers has been involved in some capacity in the family businesses. Each has some education or training relevant to real estate or construction. However, it was Ted who, at his father's request, left law school to assist Lloyd in extricating the Callahan companies from financial difficulties they encountered in the 1980s. Ted became general manager of the Callahan group of companies and as the chambers judge stated, oversaw their "administration, acquisition, financing, strategic planning, leasing, sales, and property management" for over twenty years. (At para. 31.)

[4] The "disputes and litigation" involving Ted, his brothers, and their father had begun by the date of death of Marjorie Callahan in 2002. For the most part, the chambers judge observed, Ted was the "outlier" in these disputes, as his brothers normally aligned with their father.

[5] Over the last twenty years, the enmity in the family has resulted in a series of long and costly proceedings of which this oppression action is only the most recent example. The past proceedings include a mediation/arbitration led by the late Mark Andrews, that lasted 14 years and finally achieved the separation of Ted's interests in several of the Callahan companies from those of Bob and Bruce; the "Hywood Proceedings", an oppression action brought by Ted which was dismissed in 2011 by Madam Justice Gerow (see 2011 BCSC 40); the "Chilkoot JV Proceeding," concerning certain properties in Yukon that were ultimately subdivided among the brothers; and in 2015, an unsuccessful application by the three brothers for the court-ordered winding-up of Shasta Properties Ltd. ("Shasta") under the "just and equitable" ground in s. 324 of the Business Corporations Act, S.B.C. 2002, c. 57 (the "Act"). I have attached as a schedule to these reasons a copy of all relevant provisions of the Act.

[6] The chambers judge described the genesis of the extended mediation and arbitration that began following Marjorie's death in 2002 as follows:

The mediation, and then the Arbitration, were conducted by the Callahan family's trusted legal counsel, and accountant, both of whom were familiar with the parties, their companies, and their assets (the "Arbitrators").

The Arbitrators' mandate was to separate Ted's interests from the proprietary interests of Bob, Bruce, and Lloyd, in property that then had a gross value exceeding $300 million. The Arbitrators were permitted to use their substantial prior knowledge of the financial and legal history of the companies, including knowledge of the parties and their respective contributions to, and enhancements of, the family businesses, to fairly determine and separate the interests. "Fairness" was to include accounting for each party's contributions to the Callahan family interests over the years.

Over a prolonged and complicated process, the Arbitrators divided the Callahan family assets, allocating 38 percent to Ted, and the remaining 62 percent collectively to Bob, Bruce, and Lloyd. As none of the family members wanted cash because of the undisputed family credo that "land is king", the Arbitrators allocated the various properties between the parties, in accordance with the 38/62 split. The Arbitrators also considered each side's preference for certain properties over

others. Where subdivision was possible, properties that were highly desirable to both sides were subdivided. None of the properties were sold to third parties and over 95 percent were allocated between the parties, or subdivided in a tax efficient way, relying on professional advisors. Bob, Bruce, and Lloyd agreed that they would take care of Doug's interest from their share. [At paras. 36-8; emphasis added.]

[7] By 2014, Lloyd deposed, the separation of most of Ted's interests from those of his brothers had been achieved. According to the father, Ted was by this time operating his own development and leasing company "directly in competition with the balance of the family." Shasta and a holding company, "4110", were the only remaining companies in which Ted's interests had not been separated, or were not in the process of being separated, from those of his brothers.

[8] For many years Shasta has carried on the business of owning and operating a mobile home park located on 18 acres of land on Lakeshore Drive in Kelowna. This business is relatively easy to operate, and provides a reliable cash income each year. But that is not the 'highest and best' use of the Lakeshore property. According to the chambers judge below, the property is commonly referred to in the family as the "Crown Jewel." She described it and the mobile home business thus:

The Crown Jewel consists of over 18 acres of land located across the street from Rotary Beach, one of Kelowna's public beaches. It is also less than a kilometer from two of Kelowna's resort properties, the Manteo Resort ("Manteo") and the Hotel Eldorado ("Eldorado"), which are located beside each other on the shores of Lake Okanagan. Both the Manteo and the Eldorado are owned by companies owned by Ted. The Eldorado was purchased in 2014 and the Manteo in 2015.

The Crown Jewel's operations generate a steady stream of income while requiring little administrative work. According to Shasta's 2020 financial statement, for the year ending in July 2020, the Crown Jewel generated annual revenue of just over $1,000,000, with associated expenses of just under $500,000. At the year end, Shasta had $836,245 in cash, retained earnings of $473,732, and net earnings of $470,721. In his affidavit, Ted describes the administration of Shasta's operations as straight forward. That is not disputed by Bob in his affidavit, where he says that the operations of the mobile home park require little administrative work. He outlines the management work he, Bruce, and Doug perform. I agree that the Crown Jewel is not a complicated company to operate and it provides a steady income stream to the shareholders. [At paras. 15-6.]

The assessed value of the Lakeshore property at the time of trial was some $14,295,500.

[9] Each of the brothers holds 16 shares in Shasta; one additional share is held by a family trust. In 2009, Bob, Bruce and Doug voted to reduce the number of Shasta's directors from four to three and did not re-elect Ted to the board -- a decision supported by Lloyd. (See para. 40.) This state of affairs continued after Lloyd's death in May 2021, and in addition, Bob, Bruce and Doug began avoiding any conversation with Ted, communicating with him only in writing or through counsel.

[10] In their petition in 2015, Bruce, Douglas, Robert and their father as trustee of the Trust sought an order for the liquidation of Shasta and 4110 on the basis that it would be "just and equitable" to do so. (It is not clear to me why the brothers did not simply pass special resolutions pursuant to s. 319 to liquidate, as they have now done.) Alternatively, the three brothers and Lloyd sought an order under s. 227(3)(h) of the Act that Ted sell his shares to his brothers for an amount to be determined. Ted opposed the relief sought and advocated the continuation of the status quo; alternatively, he sought an order that Shasta be liquidated and its assets sold in the open market or by means of a shotgun clause. Ted's lawyer at the time told the Court that "in the face of an application to oust him, Ted only seeks equality of treatment" and that if the Court granted an order winding up Shasta, "the appropriate remedy is one that ensures all parties have an equal opportunity to buy."

[11] In the course of his reasons in 2015 (indexed as 2015 BCSC 663), Mr. Justice Skolrood, as he then was, noted case authority to the effect that where the oppression remedy is being sought, different considerations may apply to family companies than to purely commercial ones. As stated in Naneff v. Con-Crete Holdings Ltd. [1995] 23 O.R. (3d) 481 (Ont. C.A.):

it is important to keep in mind that this is not a normal commercial operation where partners make contributions and share the equity according to their contributions or where persons invest in a business by the purchase of shares. This is a family business where the dynamics of the relationship between the principals are very different from those between the principals in a normal commercial business. As the courts below have correctly held, the fact that this is a family business cannot oust the provisions of s. 248 of the OBCA. Nevertheless, I am convinced that the fact that this is a family matter must be kept very much in mind when fashioning a remedy under s. 248(3) as it bears directly upon the reasonable expectations of the principals. [At para. 19.]

See also Safarik v. Ocean Fisheries Ltd. (1995) 12 B.C.L.R. (3d) 342 (C.A.) at para. 100, 102; Hui v. Hoa 2015 BCCA 128 at para. 51.

[12] Skolrood J. also observed that, contrary to Ted's argument, it was not necessary for a winding-up order that a deadlock exist or that the company be incapacitated by the shareholders' dispute. Rather, the focus is on the reasonable expectations of the parties:

Considering the various authorities cited by the parties, I am satisfied that the role of the court when determining whether it is just and equitable to order the winding up of a company is to focus on the reasonable expectations of the parties, and that it is not a condition precedent to the granting of relief that the conduct of the company's affairs is being impeded. As noted by Lord

Wilberforce in Ebrahimi, the just and equitable test is a flexible one and it would be dangerous to prescribe or limit the circumstances in which it will apply, for example by requiring that an applicant establish that the disharmony or dysfunction between shareholders is prejudicing the proper functioning of the company. That will be a significant factor for the court to consider but it is not determinative. ... [At para. 81.]

[13] Continuing on in his reasons, Skolrood J. cited as an example of the "disharmony and dysfunction" between Ted and his brothers the fact that Ted had taken steps to initiate the development of land held by 4110. In the Court's analysis:

Ted acknowledges that he prepared a draft subdivision plan and had preliminary discussions with City officials to determine if a rezoning application would find favour. He says however that his intention was to prepare something for review by his brothers. He says further that he "fully accepted that nothing could be done without their approval". He also notes that the draft letter to the City that he provided was intended for Doug's signature, who is the president of 4110.

This incident provides a useful, concrete example of the dysfunction and disharmony existing between the parties. It also illustrates the manner in which the two sides interpret events to favour their respective positions. From the petitioners' perspective, they characterize Ted's actions as an attempt to unilaterally initiate development of the 4110 lands. In fact, Ted initiated nothing and could not do so given his minority shareholder position and lack of any management authority in the company.

However, Ted's claim that he was in effect simply floating a proposal for his brothers' consideration rings hollow in light of his subsequent letter to Doug demanding to know why 4110 was not proceeding as he proposed. In this regard, I agree with the petitioners that Ted's actions are inconsistent with his purported contentment with his status as a passive minority shareholder. I also agree that, based on the history of the dealings between the family members, the likelihood of Ted accepting a passive minority role is minimal. [At paras. 88-90.]

[14] Skolrood J. noted that in the application before him, it was the majority that was invoking s. 324, "with the objective of ousting a minority shareholder." He ruled that the petitioners had not established it would be just and equitable to wind up Shasta based on the "failed or defeated expectations of the majority, given the ability of the majority to control and direct the company's affairs." (At para. 109; my emphasis.) He also said this about the parties' expectations as shareholders:

As set out above, the focus of the inquiry must be on the reasonable expectations of the parties. Here, the overriding expectation, as expressed by Lloyd, is that the lands owned by Shasta and 4110 would be held and developed co-operatively for the benefit of the Callahan family.

That expectation must however be considered in light of the corporate structure put in place (Hui at paras. 38 and 51) which, in this case, allocates an equal ownership interest in each of Shasta and 4110 to the four sons with Lloyd no longer having a controlling interest or any management control. To my mind, this structure accords with Lloyd's professed expectation in that it vests

control over the lands held by the companies in the sons, a majority of whom must cooperate in order to make decisions about, for example, the development of the lands. The corporate structure also ensures that no single member of the family may make decisions concerning the lands that are at odds with the wishes of the majority.

There is no doubt that the disintegration of the relationship between Lloyd, Bob, Bruce and Doug on the one hand, and Ted on the other hand, is unfortunate and not what Lloyd envisioned when he gifted the shares in Shasta and 4110 to his sons. However, I am not satisfied that the resulting disharmony has defeated the parties' reasonable expectations to the extent that recourse to s. 324 of the BCA is warranted. [At paras. 92-4; emphasis added.]

(We are told that we need not concern ourselves with 4110 in this appeal.)

[15] Following the release of Skolrood J.'s reasons in April 2015, Shasta continued to carry on the business of operating the mobile home park. In January 2019, Ted commenced a derivative action alleging breach of fiduciary duties owed to Shasta by his brothers as directors. He charged they had taken excessive directors' and management fees from 2015 on; later he extended this allegation back to 2010. Leave to pursue the claim on Shasta's behalf was granted, and we are told that the trial is now scheduled for 20-30 days in Supreme Court. As a result of the derivative action, the three brothers ceased taking any fees from Shasta from 2019 onwards.

[16] Finally, in advance of a meeting of Shasta's shareholders in 2020, notice was given that a special resolution would be proposed, seeking shareholder approval of the liquidation of the company's assets and its ultimate dissolution pursuant to s. 319 of the Act. Ted wrote to the directors seeking an explanation, but they preferred to discuss the resolution at the annual meeting. Ted alleges that the three brothers in fact refused to respond to his questions at the meeting. The resolutions to authorize the liquidation, to appoint a liquidator, and to change Shasta's name (collectively referred to by the judge below as the "AGM Resolutions") were put to a vote and passed by the three brothers, who as the holders of 75% of the shares had the ability to pass the necessary special resolution approving the liquidation. Ernst & Young Inc. was appointed as the liquidator.

Ted's Petition

[17] In short order, Ted filed a petition in the court below seeking a declaration under s. 227 of the Act that the affairs of Shasta were being conducted in a manner oppressive to him, and that an act of the company or a resolution of shareholders had been passed that was unfairly prejudicial to him. In the alternative, he sought a declaration that it would be just and equitable that Shasta be liquidated and dissolved in order to permit the court to grant remedies under ss. 324(3)(b) and 227(3) of the Act, including an order that the three brothers sell their shares in Shasta to him. In summary, as stated by the chambers judge, Ted sought the following orders:

a) an order setting aside the AGM Resolutions;

b) an order removing and discharging the Liquidator;

c) an interim, interlocutory, and/or final order staying or discontinuing the Liquidation;

d) an interim, interlocutory, and/or final injunction restraining the sale of Shasta's assets;

e) an order that the Liquidator restore to Shasta all of its remaining property, rights, and interests;

f) an interim, interlocutory, and/or final order restraining the respondents Bob, Bruce, and Doug from exercising any of their powers as directors and officers of Shasta, other than in the ordinary course of business, without further approval of this Court;

g) in the alternative to (f), an order appointing a receiver manager pending completion of the transaction referred to in (h) below; and

h) an order directing Ted to purchase all of the shares of any other Shasta shareholders, and an order directing the respondents Bob, Bruce, Doug, and Doug as trustee of the Trust, to sell to Ted all of their Shasta shares, at a price equal to the fair market value of their respective shares, without minority discount, to be determined by a chartered business valuator appointed by agreement of the parties or by application to the court. [At para. 6.]

[18] In an affidavit filed below, Ted made various arguments to the effect that there was "no good reason" for the liquidation; that the procedure carried with it the risk that he could lose his interest in the Lakeshore property; and that an auction was not the "fairest possible process". He argued in favour of a subdivision of the property, noting that subdivision had been a solution implemented by the family in the past. (There was no expert evidence as to whether subdivision would or would not decrease the market value of the 18-acre parcel as a whole.) Clearly, however, his preference was to maintain the status quo, which he said would allow the parties to (a) continue operating Shasta as a "strong and profitable" company, or (b) agree to subdivide the "Crown Jewel" amongst the four brothers. Alternatively, if the status quo was not restored, he said he would consider a shotgun process whereby his brothers, "each acting individually without knowledge of each others' offers, are the ones making an offer."

[19] The petition was strongly opposed by the three brothers and Lloyd. Bob deposed that they had voted in favour of Shasta's voluntary liquidation "because it is a decision of the majority of shareholders that upholds each shareholder's expectation for an opportunity to hold and develop Shasta's assets, acknowledging each shareholder's sentimental attachment" to the Lakeshore property. In her reasons, indexed as 2022 BCSC 87, the chambers judge described the position of the three brothers in general terms:

Bob, Bruce, and Doug oppose this petition. They submit that, at the November 2020 AGM, the majority of Shasta's shareholders, Bob, Bruce, and Doug, who was also acting as proxy on behalf of the Trust, voted to voluntarily liquidate Shasta after nearly two decades of disputes and litigation between them and Ted, including litigation over Shasta.

They submit that as a result of the AGM Resolutions, the majority shareholders have provided an equal opportunity to each shareholder, including Ted, to hold and develop Shasta's assets through a closed auction among the shareholders, under the Liquidator's guidance.

They further submit that the AGM Resolutions explicitly acknowledge each shareholder's sentimental attachment to Shasta's mobile home park, commonly referred to by the Callahan family as the "Crown Jewel", and each shareholder's preference for an interest in land over cash.

Bob, Bruce, and Doug characterize Ted's petition as an attempt to "override" the majority decision of the shareholders and to impose his will as a minority shareholder. They submit that Ted's position is contrary to his historical position that Shasta's assets ought to be dealt with by giving each shareholder an equal opportunity to buy out the others' interests. [At paras. 8-11; emphasis added.]

The Chambers Judge's Reasons

[20] The chambers judge described Shasta as a family corporation in which no single shareholder has majority control. As we have seen, its shares are held by each of the brothers equally, and one share is held by the family Trust, of which Bruce is now trustee. The judge agreed with Ted and Bob that the present business of Shasta is "not complicated" and that it provides a steady stream of income, even allowing for generous fees to directors.

[21] With respect to the development potential of the Lakeshore property, there was similarly no dispute that as deposed by Ted, "the future redevelopment of the Crown Jewel, as a beachside resort property, or a multi-family residential development, is a certainty. The only question is one of timing." (At para. 22.) The judge continued:

The Crown Jewel is of real sentimental value to Ted and his brothers. They have all been involved with Shasta, in some capacity, since they were children. Ted explains this in his affidavit, and, in response, Bob deposes:

[114] Bruce, Doug, and I hold a sentimental attachment to the [Crown Jewel] and the "Shasta" name, similar to the one Ted describes in his affidavit (paragraph 58).

[116] In 2015, [counsel] described the Shasta Kelowna Lands as the "crown jewel" of Shasta I agree with that description because it captures the importance of these lands to the Callahan family as both monetary and sentimental.

[117] This phrase also captures the central nature of the Shasta Kelowna Lands to other properties owned by members of the Callahan family.

Bob goes on to explain that he, Bruce, and Lloyd (or combinations of the three) owned several properties within an eight-kilometer radius of the Crown Jewel. [At paras. 25-6; emphasis added.]

[22] The judge described the explanation given by Bob in his affidavit evidence for the decision of the three brothers to liquidate the company:

In his affidavit, filed in response to this petition, Bob explains what he describes as the "decision of the majority of shareholders" for the AGM Resolutions to voluntarily liquidate using an auction process.

First, he says the auction process acknowledges the sentimental value of the Crown Jewel to the Callahan family. While the brothers did not play a role in acquiring the Crown Jewel, each of them holds a sentimental attachment to it and to the "Shasta" name: paras. 114-122.

Second, he says that the decision to voluntarily liquidate met the shareholders' expectations that they would have an opportunity to develop the Crown Jewel. He agrees that Ted has captured this expectation in what he called the Callahan family creed that "land is king". The Callahan brothers prefer to hold land and develop it, when it makes sense to do so. Bob says that the brothers have an opportunity to do that through the auction process in the liquidation: paras. 123-126.

Third, Bob says that the decision to voluntarily liquidate adopts Ted's position in the proceedings before Justice Skolrood, that liquidating Shasta by vote of a majority of the shareholders was a practical and fair solution. In particular, Bob says that it met Ted's position that the appropriate process was which:

[ ] allows the parties to determine the price at which they will buy or sell because each side has an opportunity to take into account subjective issues that reflect their own interests, including ownership pride and emotional connections, personal tax issues, views about future development opportunities, and synergies with other proximate properties [ ]

In summary, Bob says that the voluntary liquidation puts all shareholders on an equal footing, each with intimate knowledge of Shasta's operations and assets. Further, it avoids an independent valuation process, which historically led to years of further delay and disputes amongst the Callahan brothers. [At paras. 67-71; emphasis added.]

[23] The judge's legal analysis began at para. 72, where she set out s. 227(2) and (3) of the Act, noting that oppressive conduct normally concerns "the manner in which a company's affairs have been conducted or the manner in which the directors' powers are being executed", while "unfairly prejudicial" conduct generally "relates to specific actions of a company and shareholder resolutions either passed or proposed." (My emphasis.) As well, she noted that even where oppressive or unfairly prejudicial conduct has not been shown, a court may make an order under s. 324, including an order that a company be liquidated and dissolved, if the court considers it just and equitable to do so.

[24] The judge cited the leading Canadian case on the oppression remedy, BCE Inc. v. 1976 Debentureholders 2008 SCC 69. In that case, the Court eschewed a "categorical" approach to the oppression provisions, adopting a broader approach that combines a close consideration of the "principles underlying the oppression remedy, and in particular the concept of reasonable expectations" and, if a breach of reasonable expectations is established, a consideration of whether the conduct complained of does amount to "oppression" or "unfair prejudice". (BCE at para. 56, quoted by the chambers judge at para. 75.) The Court also noted that while "oppression" connotes conduct that is "coercive and abusive", unfair prejudice "may admit of a less culpable state of mind, that nevertheless has unfair consequences." Both phrases were said to describe "ways in which corporate actors may fail to meet the reasonable expectations of shareholders." (At para. 67.)

[25] The two-step analysis mandated by BCE (see especially para. 68) has been followed by British Columbia courts in subsequent cases, including Cote v. Milltown Marina & Boatyard Ltd. 2015 BCSC 2033, Jaguar Financial Corporation v. Alternative Earth Resources Inc. 2016 BCCA 193, and Boffo Family Holdings Ltd. v. Garden Construction Ltd. 2011 BCSC 1246. Citing Boffo and BCE, the chambers judge in the case at bar observed that:

While past practices may create reasonable expectations, practices and expectations may change over time. There can be no reasonable expectation that there will be no change to past practices: BCE at paras. 76-77. The expectations that are relevant are those that are reasonable, and that existed when the challenged decision was made ... [At para. 82; emphasis added.]

[26] At para. 84, she began a lengthy analysis of Ted's "reasonable expectations" as expressed in his affidavit evidence. These were said to include expectations that:

· Shasta would continue to hold its properties, including the "Crown Jewel," and eventually develop them for the benefit of the Callahan family;

· Ted would be able to participate along with his brothers in the financial upside of any development;

· Ted has a heightened "sentimental attachment" to the Lakeshore property because he left law school to return to Kelowna when Shasta was under financial strain in the 1980s;

· Ted wants his adult children to eventually inherit the "Crown Jewel"; and

· as demonstrated by his approach taken to the arbitration, Ted is "not interested" in the cash value of the "Crown Jewel" or in receiving cash in lieu of his interest. (At paras. 84-91.)

[27] Having set out these expectations, the judge recalled that the "disharmony and distrust" between Ted and his brothers and between Ted and his father had gone on for many years. It had been commented upon both by Gerow J. in the Hywood proceeding and by Skolrood J. in the 2015 proceeding. Indeed, Skolrood J. had stated that the one thing not in dispute between the parties was the "significant rift in the family and a high degree of animosity and distrust." Nevertheless, the judge continued, Skolrood J. had not granted the three brothers'

petition for a declaration that it would be just and equitable to wind up Shasta in 2015. After quoting paras. 98-9, 102 and 103 of Skolrood J.'s reasons, the chambers judge described his decision as follows:

In his reasons, Justice Skolrood confirmed Ted's reasonable expectations in respect to Shasta. In that proceeding, Bob, Bruce, and Doug sought to wind up Shasta. At paras. 22, 101 of his reasons, Justice Skolrood agreed with Ted that a winding-up was not appropriate because it was contrary to Ted's reasonable expectations that Shasta's assets would be held and developed by the Callahan family. In the result, Justice Skolrood dismissed the petition and maintained the status quo, despite the wishes of the majority of the shareholders to wind up Shasta: paras. 102, 110.

Family companies involve different expectations than commercial entities, and it is appropriate to take a more liberal approach to reasonable expectations in a family company: Safarik v. Ocean Fisheries Ltd., 1995 12 B.C.L.R. (3d) 342 at paras. 100-102, [1995] B.C.J. No. 1979 (C.A.).

I accept Ted's description of his reasonable expectations with respect to Shasta and find that, based on Bob's evidence, and the findings made by Justice Skolrood in Callahan 2015, those expectations are not seriously in dispute. [At paras. 100-02; emphasis added.]

[28] The Court did not make a finding of oppression, but without more, then turned to the question of whether the liquidation would be unfairly prejudicial. In the judge's words:

Having found that Ted has reasonable, legitimate expectations, the next part of the analysis involves asking whether those expectations have been unfairly prejudiced by the Liquidation Resolution. The focus here is not on Ted's legal rights as a shareholder but on his interests. Bob, Bruce, and Doug, as the majority of the shareholders, were legally entitled to pass the AGM Resolutions through voting as a block, but the question is whether, in the history and context of this closely held family corporation, they have unfairly prejudiced Ted. [At para. 103; emphasis added.]

[29] The judge rejected the point made by Bob in his affidavit that the resolution to liquidate was made by the shareholders (as required by s. 319) rather than by the directors. In her view, this was a "distinction without a difference." She noted Bob's evidence to the effect that he had voted for the AGM Resolutions because he and his brothers no longer wished to be co-owners of Shasta with Ted. She also recounted that Doug, Bruce (and Lloyd, until his death) had not provided affidavit evidence in response to the petition in this case or an explanation of their reason for adopting the Resolutions. (At para. 106.) No specific dispute had been identified that led to Bob's wish no longer to be a "co-owner" with Ted; and there was no evidence that Ted had impeded Shasta's day-to-day operations. Indeed, since he had not been re-elected to the board, Ted had not been involved in management at all. (Cf. Skolrood J.'s reasons at para. 90.) In the chambers judge's analysis, Ted was the "only vulnerable shareholder", since his brothers were "in full control of the board of Shasta, can outvote him at the AGMs, and can decide to develop the Crown Jewel when, and as, they see fit." (At para. 108.)

[30] With respect to the actual AGM Resolutions, the chambers judge adopted Ted's argument that Shasta was being controlled by the liquidator and that the liquidator's appointment "risks the Crown Jewel being sold to a third party outside the Callahan family." The liquidator had proposed four possible options for the sale of the Lakeshore property, ranging from a closed auction (i.e., an auction among the current shareholders of the company) to a public one. All four options, the judge observed, risked Ted's losing his "sentimental attachment to the Crown Jewel" and violated his "reasonable expectations that he would maintain an ownership interest in the Crown Jewel and participate in its development potential." In this respect, the liquidator had confirmed that it intended to market Shasta's assets "by way of a public process to ensure that fair market value is obtained." (At para. 115.)

[31] In the judge's analysis, this outcome ran contrary to Ted's legitimate expectation that he would receive his interest in the Crown Jewel "in land, not cash".[1] Although Bob had suggested in his affidavit that liquidation was the fairest possible outcome and that it would uphold "each shareholder's expectation for an opportunity to hold and develop the Crown Jewel", the judge found that Bob's affidavit did not "make sense" in the context of this case. In her analysis:

... The auction process will result in one or more of the current shareholders in Shasta losing the opportunity to hold and develop the Crown Jewel, and in light of the history of cooperation between Bob, Bruce, and Doug, it is likely that they will collectively outbid Ted in any closed auction process.

Even a closed auction process between the brothers means that at least one brother will lose his interest in the Crown Jewel and will have to settle for cash instead of land. There is no direct evidence that Bob, Bruce, and Doug will act collectively against Ted in bidding for the Crown Jewel, but history suggests they will do so, and on the evidence, I can draw a strong inference in that regard. The fact that Bruce and Doug have not filed affidavits in response is further evidence that they are happy to let Bob speak for them collectively. In addition, although Ted proposed to buy each of his brothers' individual shares in Shasta, their counsel responded that they were not interested in the offer but, instead, would buy Ted's shares. [At paras. 118-9; emphasis added.]

She also adopted Ted's argument that:

For every $1 Ted bids in a closed auction, Bob, Bruce, and Doug need only bid $0.33 each to match his bid. If the Crown Jewel sells for $16 million, Ted would have to come up with $12 million in cash, while his brothers would only have to come up with $1.3 million in cash each. [At para. 120.]

[32] Although she rejected Ted's complaint that he was suffering from an "informational deficit" regarding Shasta's affairs, the judge did accept that Ted "risks more in an auction than his brothers, and they know that. An auction is a calculated gamble by Ted's brothers to indirectly buy him out of Shasta, contrary to Ted's reasonable expectations." (At para. 123.)

[33] Ted also submitted that the only way his "legitimate expectation" that any separation would be accomplished in a way that allowed him to preserve his (indirect) interest in the "Crown Jewel" would be by the subdivision of the Lakeshore property -- an option not being considered by the liquidator. The judge found it unnecessary to consider this alternative, given her conclusion that the proposed liquidation was unfairly prejudicial to Ted. As she observed:

... when the effects of the AGM Resolutions are compared to Ted's reasonable expectations, liquidation is unfairly prejudicial to him. Instead of all the members of the Callahan family being involved in, and benefitting from, the development of the Crown Jewel, the Liquidator has taken control of Shasta and the Crown Jewel. That is directly contrary to Ted's expectations and to Justice Skolrood's decision maintaining the status quo. While the AGM Resolutions may be a valid exercise of the power of the majority of the shareholders, they are outside of what can fairly be regarded as having been in the contemplation of the shareholders when they acquired their shares in Shasta, since all of the shareholders had an understanding that the Crown Jewel would be held and developed for the benefit of the Callahan family. That understanding and Ted's reasonable expectations have not changed. [At para. 125; emphasis added.]

[34] In the result, the chambers judge ruled that the status quo should be restored by setting aside the AGM Resolutions. She added:

As Shasta is not in a deadlock situation, and Bob, Bruce, and Doug, as shareholders, have the collective shareholdings to continue to appoint themselves as directors of Shasta, and to manage the Crown Jewel. There are no obstacles to Shasta continuing to hold the Crown Jewel with a view to developing it at some future date, with Ted as a part of, and able to share in, its development potential. [At para. 135; emphasis added.]

The Court granted the petition and set aside the AGM Resolutions.

On Appeal

[35] In this court, Robert and Bruce Callahan (the latter personally and as trustee of the family Trust) assert two related errors on the part of the chambers judge -- first, that she erred in concluding that Ted "reasonably expected the Callahan brothers to hold and eventually develop the [Lakeshore property] together"; and second, that she erred in concluding that the AGM Resolutions were unfairly prejudicial to Ted, in light of that expectation.

[36] Douglas Callahan expressed his grounds of appeal somewhat differently:

The chambers judge erred in finding that Ted has a "reasonable expectation" that Shasta will own and carry out the future development of the Property with Ted's involvement or participation and for his benefit and that this operates to negate the statutory rights of the majority shareholders of Shasta under s. 319 of the Business Corporations Act, S.B.C. 2002, c. 57 (the "BCA").

Further or alternatively, the chambers judge erred in finding that a sale process in the liquidation of Shasta under which Ted has an equal opportunity to acquire ownership of the Property is "unfairly prejudicial" to Ted under s. 227(2)(b) of the BCA.

Standards of Review

[37] All three appellants relied on the principle that whether particular conduct amounts to oppressive or unfairly prejudicial conduct is a question of mixed fact and law. In order for this court to interfere with a finding of mixed fact and law, they argued, the appellant must generally show a palpable and overriding error. Even then, they added, "due to the deferential standard of review on an appeal from an exercise of discretion, the court on appeal may interfere only if the court below acted on a wrong principle, gave insufficient or no weight to relevant considerations, or made a decision that is so clearly wrong it results in an injustice ". (Citing M. McIsaac Family Holdings Ltd. v. Tolam Holdings Ltd. 2020 BCCA 371 at para. 60; see also Naneff at paras. 18-9.)

[38] This of course is correct, but where the trial court has committed an extricable error of law in determining the reasonableness of a shareholder's expectations, it is open to an appellate court to intervene on the correctness standard. (See Canex Investment Corporation v. 0799701 B.C. Ltd. 2020 BCCA 231 at para. 18; Khela v. Phoenix Homes Ltd. 2015 BCCA 202 at para. 38.) Having heard counsel's oral submissions, I understand the first ground of appeal (or at least Robert and Bruce's first ground) to be that the judge erred in law in assuming that Ted's actual and subjective expectations were reasonable, without considering the "objective and contextual" aspects of those expectations. The second ground of appeal, on the other hand, is one of mixed fact and law to which the "palpable and overriding" standard of review applies.

Reasonable Expectations

[39] The requirement that the expectations of a person seeking relief under s. 227 must be reasonable in the corporate context in which they arise has been expressed on many occasions since BCE was decided. In that case itself, the Supreme Court of Canada stated:

As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see 820099 Ontario; Main v. Delcan Group Inc. (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold. [At paras. 62-3; emphasis added.]

[40] The Supreme Court provided a list of "factors" emerging from the case law that are helpful in determining the reasonableness -- or lack thereof -- of expectations that inform the broad discretion given to the court under s. 227 in a given case. These included general commercial practice; the nature of the corporation; relationships between shareholders, including family ties or friendships; past practice (although the Court also noted that practices and expectations "can change over time"); the existence of a shareholders' agreement or representations made to stakeholders or to the public in formal documents; and the nature of any conflicting interests that might be at play. (At paras. 72-88.)

[41] The principle that an applicant's expectations must be reasonable if s. 227 is to be engaged resonates in particular in cases involving family companies. In a seminal decision involving a complex family company, 820099 Ontario Inc. v. Harold E. Ballard Ltd. [1991] 3 B.L.R. (2d) 113 (Ont. Gen. Div.), aff'd [1991] 3 B.L.R. (2d) 113 (Ont. Div. Ct.), Mr. Justice Farley wrote that:

Shareholder interests would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual 'wish list'. They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders." (At 185-6; emphasis added.)

Farley J. also quoted a passage from Stone v. Stonehurst Enterprises Ltd. (1987) 80 N.B.R. (2d) 290, where Landry J. reasoned:

It must be remembered ... that it is only the interests of a shareholder as such, or of a director or officer as such that is protected by this section.

The applicant must establish that his interest as a shareholder has been affected. He may of course have other interests, such as being a prospective purchaser of the assets of the company. But it is only the applicant's interest as a shareholder which we must be concerned with in applying s. 166 [of the then New Brunswick Business Corporations Act.] [At 305; emphasis added.]

(See also Naneff at paras. 25-8 and Re Giroday Sawmills Ltd. (1983) 49 B.C.L.R. 378 (S.C.) at paras. 10-13.)

[42] More recently, the Supreme Court of Canada confirmed in Wilson v. Alharayeri 2017 SCC 39 that the oppression remedy:

... protects only those expectations derived from an individual's status as a security holder, creditor, director or officer. Accordingly, remedial orders under [the oppression remedy in s. 241(3) of the Canada Business Corporations Act, R.S.C. 1985, c. C-44] may respond only to those expectations. They may not vindicate expectations arising merely by virtue of a familial or other personal relationship." [At para. 54; emphasis added.]

[43] The notion that an applicant's rights must be rights qua shareholder, director or security-holder was echoed by this court in Hui v. Hoa. It was an oppression application and concerned two family companies that had been the subjects of estate freezes. Chiasson J.A.

for the Court stated that where a family company is involved, it is "essential" to examine the corporate rights of the parties as stakeholders in the corporation, not as members in a family." (At para. 38.) He acknowledged that the concept of "reasonable expectations" is objective and contextual. Applying an objective and contextual analysis to one of the companies, in which the plaintiff had years ago transferred control to her son, the Court ruled that her expectation of a continuing stream of income from the company was "no longer anchored to the corporate structure"; nor could her expectations be said to be derived from "any other recognized legal structure, such as a trust or shareholders' agreement." (At paras. 53, 58.) The Court ultimately ruled that the estate freeze structure, which had been put in place for tax reasons, could not be negated by family divisions or expectations.

[44] I have already referred to Skolrood J.'s reasoning in 2015 that under the share structure of Shasta instituted by Lloyd, control over the property was vested in the brothers, "a majority of whom must co-operate in order to make decisions about, for example, the development of the [Lakeshore property]. The chosen structure ensures that no single member of the family may make decisions concerning the lands that are at odds with the wishes of the majority." (At para. 93.) There was no evidence of any shareholders' agreement in this case; nor was any special restriction incorporated into Shasta's articles that would prevent a shareholder from voting in any particular way. Given that each brother received almost 25% of the issued shares (one share being held by the family Trust), one may infer that Lloyd (and eventually the four brothers) were content that any three brothers plus the trustee would be able to pass a special resolution, and that any two brothers plus the trustee would be in a position to pass resolutions requiring only a simple majority.

[45] Of course it is true that in the past, all four brothers and their father hoped the Lakeshore property would be "held and ultimately developed by the Callahan family" (Skolrood J. at para. 101.) But as we have seen, shareholder expectations may change and evolve. They certainly have in this instance. It would appear that what Bob referred to in his affidavit as the "breakdown of the Callahan family enterprise" has led the three brothers to conclude that a future that involves their working together with Ted to develop the Lakeshore property would promise only further discord and litigation. As Lloyd deposed as early as 2014:

Ted's conduct has been completely contrary to that expectation [of working co-operatively with his brothers] ... He has for many years now embarked on a course of conduct designed to advance his own interests at the expense of the rest of the family.

and:

... it is beyond doubt that it is not possible for Ted on one hand and myself and my other sons to remain in business together.

The rancor is such that the three brothers are willing to jettison their "sentimental" attachment to the Lakeshore property and hazard their chances to purchase it in an auction conducted by a professional liquidator.

[46] In my respectful opinion, the chambers judge erred in failing to address the question of whether the expectations held by Ted as a shareholder of Shasta were objectively and contextually reasonable. Unfortunately, the judge moved directly from Ted's description of his expectations (which she erroneously said had been "acknowledged" by Bob), to a finding that they were "not seriously in dispute". The issue, however, was not the sincerity of Ted's expectations, but their reasonableness in the corporate context.

[47] Had the chambers judge asked the question of whether Ted's expectations were reasonable, I believe she would have found that after 20 years of acrimony at the expense of various Callahan family enterprises, the hope that one day the brothers would co-operate in developing the "Crown Jewel" was simply no longer plausible. It is an impossible dream, and indeed ignores what in my opinion has become a new status quo in the Callahan group of companies -- the separation of Ted's interests from those of his brothers. The achievement of this objective in connection with other parts of the family portfolio has involved a great deal of time (and no doubt, money): the arbitration took 14 years of intense work by the brothers and their professional advisors; the completion of the purchase of Ted's shares in Hywood took almost three years from the date of Gerow J.'s order because every aspect of the separation was disputed; and the subdivision of the Chilkoot property, which was resolved just before a scheduled trial in 2013, took many months and involved obtaining three independent appraisals for each parcel of land, every aspect of which was contested. However, this objective has not yet been realized in respect of Shasta, despite the attempt made in 2015 for a court-sanctioned winding up.

[48] The chambers judge attached a great deal of importance to the "sentimental attachments" of Ted and his brothers to the Lakeshore property and the dream of its development. With all due respect for "sentimental" attachments, I am not persuaded that given the context of Shasta's corporate structure and the parties' history, Ted's stated expectations regarding Shasta are reasonable. In other words, I do not believe that Ted could, at the time the AGM Resolutions were passed, reasonably expect he would be entitled as a shareholder to block a 75% majority from passing the liquidation resolution. Put another way, he could not reasonably expect that the holders of 75% of the shares of Shasta could be forced by the holder of just under 25% of the shares to hold the Lakeshore property indefinitely, in the face of the certainty that its development would only open the door to more "disharmony and dysfunction".

[49] In summary, I conclude that the chambers judge did err in law in assuming that Ted's actual and subjective expectations were reasonable, and in failing to consider the "objective and contextual" aspects of those expectations.

Unfairly Prejudicial Conduct?

[50] Although it is unnecessary, given this conclusion, for us to address whether the chambers judge also erred in ruling that the liquidation of Shasta and the sale of its assets in an auction would be "unfairly prejudicial" to Ted, I will do so briefly. It will be recalled that in 2015, Ted expressed a willingness for Shasta's assets to be sold in the open market or by shotgun sale, although he preferred the preservation of the status quo to that alternative. (See paras. 5 and 102 of Skolrood J.'s reasons.) The chambers judge in the case at bar, however, was of the view that the three brothers would "act collectively against Ted in bidding for the Crown Jewel" in a public auction. She observed:

For every $1 Ted bids in a closed auction, Bob, Bruce, and Doug need only bid $0.33 each to match his bid. If the Crown Jewel sells for $16 million, Ted would have to come up with $12 million in cash, while his brothers would only have to come up with $1.3 million in cash each. [At para. 120.]

[51] As counsel for the appellants contended, this reasoning fails to recognize that Ted would be acquiring the entire Lakeshore property, while each of the brothers would be acquiring only one-third (if the three were to bid together.) More to the point, there is no evidence to suggest that Ted would have serious difficulty in coming up with the funds to purchase the Lakeshore property at an auction should he wish to do so. Indeed, the evidence suggests otherwise: Ted owns at least two other valuable developed or developing properties on Lakeshore Drive, as well as other properties in the province. He has not pleaded or argued that he would be unable to participate realistically in the auction of Shasta's assets. If he has an especially strong "sentimental" attachment to the "Crown Jewel", there is nothing stopping him from offering a purchase price that reflects that special attachment.

[52] Importantly, the auction process treats all shareholders equally as potential purchasers. The process does not require costly valuations or agreement on a starting bid; nor does it subject any brother to a disadvantage. As counsel pointed out, professionally-conducted auctions have been resorted to in various instances similar to this one. In this regard, I note the reasoning of Hoy J. in Pusateri v. Trozzo [2005] O.J. No. 5605 (Ont. S.C.J.) at para. 25 and of McEwan J. in Libfeld v. Libfeld 2021 ONSC 4670, a dispute among brothers as shareholders of a real estate company. McEwen J. found that the winding-up of the company and the sale of its assets was the best alternative remedy, observing:

This is the only reasonable option given the extreme dysfunction that exists, both personally and professionally, between the Libfeld brothers. As will be seen, this extreme dysfunction has evolved significantly over time ... As noted, the Libfeld brothers concede that their differences are irreconcilable. There is a complete lack of trust and mutual respect between the two warring factions. The Wind-Up and Sale is the only workable solution. [At para. 15.]

Somewhat similar considerations resonate in the case at bar, where the main asset of the company is unencumbered real estate. It will be recalled that Ted himself argued in the 2015 proceeding that as long as he had an "equal opportunity" to buy, he would consider that he was fairly treated.

[53] Indeed, it is difficult to understand how an auction process could be said to be unfair to any of the brothers. Each will be able to bid either in the closed or the public auction, and each may if necessary find lenders, partners or joint venturers who appreciate the value of the Lakeshore property and are willing to work co-operatively with the purchaser(s) in developing it to its full potential. It is unfortunate that the income tax implications of a sale by Shasta of its assets may be higher than might be necessary under other arrangements, although no evidence was adduced on this point. But in the long run, it may well be that the costs of further litigation that could have been expected in future had no liquidation occurred, would exceed the amount of taxes triggered by the liquidation.

[54] In my view, the chambers judge committed a palpable and overriding error in concluding that the AGM Resolutions were "unfairly prejudicial" to Ted. To borrow from the description in Benhaim v. St-Germain 2016 SCC 48, of what constitutes a palpable and overriding error, this error was "in the nature not of a needle in a haystack, but of a beam in the eye." (At para. 39, quoting Morissette J.A. in J.G. v. Nadeau 2016 QCCA 167 at para. 77.) The three brothers are in a position to bring the years of family squabbling to an end and they have chosen to do so in a manner that is not unfairly prejudicial to Ted as a shareholder of Shasta.

[55] In the result, my colleagues and I reached the conclusion that the appeal should be allowed, such that the AGM Resolutions again came into effect on October 11, 2022.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

Schedule of Relevant Legislation

Business Corporations Act, S.B.C. 2002, c. 57

Complaints by shareholder

227(1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A shareholder may apply to the court for an order under this section on the ground

(a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or

(b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

(3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order

(a) directing or prohibiting any act,

(b) regulating the conduct of the company's affairs,

(c) appointing a receiver or receiver manager,

(d) directing an issue or conversion or exchange of shares,

(e) appointing directors in place of or in addition to all or any of the directors then in office,

(f) removing any director,

(g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,

(h) directing a shareholder to purchase some or all of the shares of any other shareholder,

(i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,

(j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,

(k) varying or setting aside a resolution,

(l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,

(m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,

(n) directing correction of the registers or other records of the company,

(o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,

(p) directing that an investigation be made under Division 3 of this Part,

(q) requiring the trial of any issue, or

(r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

(4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

(5) If an order is made under subsection (3) (g), (i) or (m), the company must pay to a person the full amount payable under that order unless there are reasonable grounds for believing that

(a) the company is insolvent, or

(b) the payment would render the company insolvent.

(6) If reasonable grounds exist for believing that subsection (5) (a) or (b) applies,

(a) the company is prohibited from paying the person the full amount of money to which the person is entitled,

(b) the company must pay to the person as much of the amount as is possible without causing a circumstance set out in subsection (5) to occur, and

(c) the company must pay the balance of the amount as soon as the company is able to do so without causing a circumstance set out in subsection (5) to occur.

(7) If an order is made under subsection (3) (o), Part 10 applies.

Authorization for liquidation

319(1) A company may liquidate under this Division if it has been authorized to do so by a special resolution.

(2) At the time that the special resolution referred to in subsection (1) is passed, the company, by an ordinary resolution,

(a)must appoint as liquidator one or more persons qualified under section 327, and

(b)may set, or may authorize the directors to set, each liquidator's remuneration.

(3) An appointment of a liquidator under this section takes effect on the commencement of the liquidation.

(4) A liquidator appointed under this section may apply to the court to set or review that liquidator's remuneration if

(a) that remuneration is not set within 2 months after the liquidator's appointment under subsection (2) (a), or

(b) the liquidator is dissatisfied with the amount of the remuneration set under subsection (2) (b).

Court may order company be liquidated and dissolved

324(1) On an application made in respect of a company that is a financial institution by the superintendent, or made in respect of a company, including a company that is a financial institution, by the company, a shareholder of the company, a beneficial owner of a share of the company, a director of the company or any other person, including a creditor of the company, whom the court considers to be an appropriate person to make the application, the court may order that the company be liquidated and dissolved if

(a) an event occurs on the occurrence of which the memorandum or the articles of the company provide that the company is to be liquidated and dissolved, or

(b) the court otherwise considers it just and equitable to do so.

(2) Nothing in subsection (1) prevents the court from requiring that security for costs be provided by a person bringing an application under that subsection.

(3) If the court considers that an applicant for an order referred to in subsection (1) (b) is a person who is entitled to relief either by liquidating and dissolving the company or under section 227, the court may do one of the following:

(a) make an order that the company be liquidated and dissolved;

(b) make any order under section 227 (3) it considers appropriate.

(4) If the court orders under this Act that a company be liquidated and dissolved, the court must, in its order, appoint one or more liquidators.

(5) An appointment of a liquidator under subsection (4) takes effect on the commencement of the liquidation.

Duties of liquidators

330 A liquidator must

(a) promptly after the commencement of the liquidation, comply with section 331,

(b) take into the liquidator's custody or control the property, rights and interests of the company, including, without limitation,

(i) the records that the company is required to keep under section 42, and

(ii) the other records of the company,

(c) ensure that the records referred to in paragraph (b) (i) of this subsection are maintained and made available in accordance with Division 5 of Part 2,

(c.01) if the company is a private company within the meaning of section 119.1, ensure that the company's transparency register is maintained and made available in accordance with Part 4.1,

(c.1) without limiting paragraph (c) or (c.01), if the records that the company is required to keep at its records office have been physically transferred to a new location, promptly after that change occurs, file with the registrar a notice of change of address, in the form established by the registrar, to transfer the location of the records office to that new location, and section 35 (3) applies,

(d) subject to this Part, use the liquidator's own discretion in realizing the assets of the company or distributing those assets among the creditors and shareholders of the company,

(e) keep proper records of all matters relating to the liquidation, including accounts of the money of the company received and paid out by the liquidator,

(f) include, on each invoice, order for goods and business letter issued by or on behalf of the liquidator or on which the name of the company appears, a statement that the company is in liquidation,

(g) use the designation of liquidator of the company on any record issued by or on behalf of the liquidator in relation to the company and on which the name of the liquidator appears,

(h) until money held by the liquidator is required for distribution to creditors and shareholders, invest that money as permitted under the provisions of the Trustee Act respecting the investment of trust property by a trustee, or place that money on deposit in an interest bearing account with any savings institution, and add to the assets of the company any dividends or interest received from that money,

(i) if at any time the liquidator determines that the company is unable to pay or provide for the discharge of its liabilities, promptly apply to the court to

(i) stay any proceedings taken under this Part, and

(ii) seek directions,

(j) if the business of the company is carried on under section 334 (1) (c) (iii) or 340 (2), produce at least once in every 12 month period after the liquidator's appointment, or more or less often as the court may order, financial statements of the company in the form required by the court or, if and to the extent that there are no court requirements, financial statements considered by the liquidator to be appropriate,

(k) annually, within 2 months after each anniversary of the date of the recognition of the company, file with the registrar, instead of an annual report for the company under section 51, a liquidation report in the form established by the registrar containing information that is current to the most recent anniversary,

(l) dispose of the assets of the company, other than assets that are to be distributed in kind to the company's shareholders, and pay or make provision for all of the company's liabilities, and

(m) after publishing and sending the notices required under section 331, and after paying or providing for, in the manner contemplated by this Part, all of the company's liabilities, including the remuneration, if any, of the liquidator and all of the other costs, charges and expenses properly incurred and to be incurred in relation to the liquidation, distribute the company's remaining assets, either in money or in kind, among the company's shareholders according to their rights and interests in the company.

Powers of liquidators

334 (1) Subject to section 320 (1), if a liquidator is appointed under this Act,

(a) the liquidator has the powers to manage or supervise the management of the business and affairs of the company that were, before the appointment, held by the directors and officers of the company, and the powers of the directors and officers cease, except so far as the liquidator approves the continuation of them,

(b) the liquidator may exercise the powers of the company that are not required by this Act to be exercised by shareholders of the company, and

(c) the liquidator may, without limiting paragraphs (a) and (b) of this subsection,

(i) retain lawyers, accountants, engineers, appraisers and other professional advisers,

(ii) bring, defend or take part in any legal proceeding in the name of and on behalf of the company,

(iii) carry on the business of the company if and to the extent that the liquidator considers it necessary or advisable to do so for the liquidation,

(iv) sell by public auction or private sale any assets of the company,

(v) do all acts and sign any records in the name of and on behalf of the company,

(vi) borrow money on the security of the assets of the company,

(vii) settle or compromise any claims by or against the company,

(viii) do all other things necessary for the liquidation and distribution of the company's assets, and

(ix) change one or both of the mailing address and delivery address of one or both of the company's registered office and records office by filing with the registrar a notice of change of address in the form established by the registrar, and section 35 (3) applies.

(2) A liquidator has the powers referred to in subsection (1) from the commencement of the liquidation until

(a) the liquidation is stayed or discontinued, or

(b) in the case of a liquidation conducted under Division 3,

(i) the liquidation is stayed or discontinued, or

(ii) the statement of intent to liquidate is withdrawn under section 323 (1).

[1] I note that this expression and other similar wording throughout the judge's reasons ignores the fact that the Lakeshore property is owned by Shasta, not by Ted and his brothers directly. Although counsel for Douglas argued on appeal that the chambers judge erred in approaching this case as if Ted owned an interest in the property directly, I think it unlikely that the judge did not appreciate that a shareholder does not have ownership rights to assets of the corporation.

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