

CANADA / JUDGMENT

McIsaac v. David

2019 BCSC 931

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Supreme Court of British Columbia

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2019 BCSC 931 McIsaac v. David

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McIsaac v. David,

2019 BCSC 931

Date: 20190611

Docket: 28331

Registry: Cranbrook

Between:

John Robert McIsaac

Plaintiff

And

Bruce Patrick Paul David, Deborah Susan David, Cathy-Anne David, and Columbia View Homes Ltd.

Defendants

And

Columbia View Homes Ltd. and John McIsaac

Defendants by Way of Counterclaim

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff and Defendant by Way of Counterclaim, John Robert McIsaac:

A. Bird

Counsel for the Defendant Cathy-Anne David and the Defendant by Way of Counterclaim,
Columbia View Homes Ltd:

B.F. Fairley

Place and Date of Hearing:

Cranbrook, B.C.

December 3, 2018

Place and Date of Judgment:

Cranbrook, B.C.

June 11, 2019

Introduction

- [1] There are two interlocutory applications before me, one brought by the defendant Cathy-Anne David together with the defendant and defendant by way of counterclaim, Columbia View Homes Ltd. ("CVH"), and another, a cross-application, brought by the plaintiff, John McIsaac. CVH, which is a BC company, is one of three companies Ms. David and Mr. McIsaac have direct or indirect interests in; the other two companies are Alberta corporations. The present applications broadly concern the operation of CVH and the use of its assets, in particular a campground and paragliding park south of Golden, BC known as Golden Eco-Adventure Ranch ("GEAR"). The applications also concern Cathy-Anne's conduct in having caused CVH to divest itself of a property known as "Lot 4".
- [2] For the sake of clarity, I will refer to the personal applicants by their first names. John and Cathy-Anne are husband and wife. They are involved in contentious divorce proceedings in Alberta (the "Divorce Action"). In their affidavits they both describe Canmore, Alberta, as their place of residence. Of relevance to the request in Cathy-Anne's application that John post security for costs, is that John has no residence in British Columbia and has no direct ownership of any real property or other assets here.
- [3] The parties have filed extensive affidavits. I set out the evidence below only in summary form, to give context to the reasons and the orders that follow.

Allegations

- [4] In this action John, in respect of the GEAR lands, alleges by way of a Notice of Civil Claim filed May 10, 2018 that Cathy-Anne's conduct in mortgaging the GEAR lands to secure a mortgage to Liberty Investments Ltd. ("Liberty", and the "Liberty Mortgage"), in paying herself director's fees, and in excluding him from management, has been oppressive, within the meaning of s. 227 of the Business Corporations Act, S.B.C. 2002, c. 57, s. 227 [BCA]. He

further alleges that the Liberty Mortgage constituted a fraudulent conveyance. Other allegations are made concerning the sale of Lot 4.

- [5] Cathy-Anne has counterclaimed. She alleges that John has, inter alia, breached fiduciary duties owed to CVH and acted deceitfully by diverting business opportunities to himself and misrepresenting his activities to the shareholder of CVH; failed in his duty as a director and officer of CVH by purchasing Lot 4 at a "massively inflated value", and by abusing drugs and alcohol to the extent that his ability to act in the best interests of CVH was impaired; acted oppressively by utilizing CVH's profits for his personal use; and interfered in the management of CVH.

Background

- [6] In 1993 the parties incorporated an Alberta Company, Bow View Homes Ltd. ("Bow View"), through which John built and sold houses. John and Cathy-Anne are equal shareholders in Bow View. John served as a director and President of Bow View from 1993 to July 2017.
- [7] There is an ongoing oppression remedy action before the Alberta Court of Queen's Bench, brought by Cathy-Anne against John and Bow View. That action was ordered, in September 2016, to be consolidated with the Divorce Action. Cathy-Anne describes in her Affidavit #1, sworn July 3, 2018, how John was removed as a director of Bow View on July 27, 2017, by way of a consent order pronounced by Madam Justice Hollins. The consent order was entered into after Hollins J. had advised John on that day that she would adjourn the application before her for 15 minutes to give John the opportunity to resign, failing which she would order him removed. This description of what transpired is not contested in John's affidavits. As will be seen below, Cathy-Anne maintains that the parties' circumstances with respect to Bow View provided the impetus for steps she took to assume management of CVH, which steps led directly to the present action and these applications.
- [8] John and Cathy-Anne's second Alberta company is Great Divide Enterprises Ltd. ("Great Divide"), incorporated in 1998. Great Divide serves as a holding company. John and Cathy-Anne each own 50% of the shares of Great Divide, although from the allegations in the underlying pleadings it appears that some portion of their ownership may be indirect, through a family trust. Cathy-Anne has always been sole director of Great Divide.
- [9] Great Divide owns 100% of the shares of the BC company, the defendant CVH.
- [10] CVH is the owner of GEAR, a campground and paragliding park south of Golden, BC. John is an aerial sports enthusiast, and has been personally involved in the many sporting activities hosted at the GEAR site. As alleged by John in his Notice of Civil Claim, CVH pays a general manager to manage the campground on a contract basis. CVH also, throughout the latter years of the parties' marriage, owned a separate vacant lot in Golden ("Lot 4") that had been acquired and was being held for future development.

- [11] The parties separated in July 2015. Their two children are attending university, and have resided with Cathy-Anne since the separation. John paid no child support for approximately the first ten months following separation. Cathy-Anne obtained a child support order from the Alberta courts in September 2017, for table support and ongoing Section 7 expenses. The order is being enforced through the Alberta Family Maintenance Program. Cathy-Anne has a claim against John for retroactive table support totalling more than \$11,000, and retroactive s. 7 expenses, his share of which is alleged to total more than \$25,000.
- [12] In addition to the corporate finances described below, Cathy-Anne provides evidence of the parties' extensive personal indebtedness:

Royal Credit Line, as of 20/08/2018

\$ 11,600.00

TD Line of Credit, as of 31/07/2018

\$ 376,309.68

ATB Home Equity Line of Credit, as of 31/07/2018

\$1,497,170.89

- [13] Cathy-Anne states in her 3rd affidavit that John has made no payments towards his share of these personal debt obligations, since 2015; his share of the TD and ATB debt obligations has been paid by Bow View, with income earned through her efforts, and she has personally paid his share for the Royal Credit Line. The total debt servicing costs on those three accounts from May 2016 to October 2018 are said by her to amount to just over \$141,000, of which he is responsible for half.
- [14] Cathy-Anne and the children continue to reside in the matrimonial home. The mortgage on the home is being paid by Bow View; each of the parties have half the mortgage amount debited against their Bow View shareholder loan balances. Cathy-Anne is paying no form of occupational rent.

Sale of Lot 4

- [15] John had caused CVH to purchase Lot 4 in 2007, at a price of \$1,050,000. Approximately half the purchase price was put up by Cathy-Anne's brother, the defendant Bruce David, and his wife, the defendant Deborah David, who thereby held equitable interests.
- [16] CVH did not go on to develop Lot 4. Efforts were made to sell it, without success.
- [17] The assessed value of Lot 4 steadily declined in the years following its purchase by CVH. By 2016, the assessed value was only \$366,000.

- [18] In December 2016, Cathy-Anne caused CVH to sell Lot 4 to Bruce and Deborah. The sales price was \$250,000, which she says reflected fair market value. She says she was motivated to sell the property in part because CVH needed funds to pay an outstanding home warranty claim of approximately \$55,000.
- [19] The Notice of Civil Claim herein originally alleged that Bruce and Deborah, in purchasing Lot 4, were knowing parties to a fraudulent conveyance, having had "notice or knowledge of collusion or fraud". John filed a Notice of Discontinuance in respect of the action against Bruce and Deborah on August 17, 2018.
- [20] In response to John's demand for an accounting of the proceeds of sale of Lot 4, Cathy-Anne sets out a balance sheet as an exhibit to her 2nd affidavit, sworn September 14, 2018. It shows that after payment out to Bruce and Deborah of their share of the proceeds, and transaction costs, CVH's share of the proceeds was \$113,699.66. Those funds were disbursed to a number of accounts, including payments to Bow View totalling \$74,500, and payment to her personally for "past due management fees" of \$5,188.75.
- [21] John disputes this accounting on a number of points, in his 4th affidavit. He says that she has not provided back-up documents; that the proceeds she attests to of \$113,699.66 do not reconcile with the figure of \$123,436.25 set out in a statement of adjustments provided to him by Bruce David; and that the accounting shows only \$20,709.40 was paid to satisfy the home warranty claim, not \$55,000. He questions the \$74,500 paid to Bow View.

Cathy-Anne's Management of CVH and Bow View

- [22] In July 2016 Cathy-Anne, using her powers as President and Chair of Great Divide (the sole shareholder of CVH), removed John as director of CVH and appointed herself as director in his place. She states her reasons for doing so in her second affidavit, filed September 14, 2018:
4. I made the decision to remove McIsaac as Director of CVH because McIsaac, who was the sole director of Bow View, failed to perform his fiduciary duty and act in the best interests of the company and his attitude to the management of CVH reflected similar indifference to the effect of his management decisions on the fortunes of CVH
- [23] Cathy-Anne has subsequently taken director's fees from CVH. John alleges this was contrary to the parties' past practices. Cathy-Anne says the director's fees have provided fair compensation for her efforts in managing the operational matters concerning the GEAR Property, including handling the financial information, accounts, budgeting and communication with the necessary authorities to abide by CVH's financial responsibilities.
- [24] Further, in October 2016 Cathy-Anne caused CVH to grant a sizeable mortgage over the GEAR lands to Liberty, to secure a loan used to finance a residential development project on lands in Canmore, Alberta, owned by Hillcroft Developments Inc. ("Hillcroft", and the "Hillcroft Venture"). She describes in her 1st affidavit that in October 2017 CVH entered into

commercial agreements with Bow View and two Alberta companies, NuAlpine Homes Ltd. (NuAlpine) and Hillcroft, whereby NuAlpine would build homes, Liberty would provide financing secured by the Liberty Mortgage, and in consideration of CVH granting the Liberty Mortgage it would receive half the total profits, and Bow View would be retained as project manager on a flat fee. Cathy-Anne deposed in her 1st affidavit that the Hillcroft Venture was expected to yield a profit, to CVH, exceeding \$177,000.

- [25] When John learned of the Liberty Mortgage he filed a certificate of pending litigation ("CPL") against the property. He says that he did so not knowing of the Hillcroft Venture, and was motivated by a concern that it was never CVH's business to loan money, nor did he agree to CVH putting the GEAR property at risk in a new development. He views the GEAR Property as a "nestegg" which provides cashflow, and as a property the parties, before their separation - and post-separation, his intent remains the same - intended to own as income property to provide for in their later years. Further, he says it is a place where he can indulge in his passion for paragliding. In short, he deposes that he is "not okay with Cathy-Anne putting a joint asset at risk and then taking all of the profits for herself." Cathy-Anne presents evidence that the filing of the CPL interfered with the timing of loan funding by Liberty and put CVH's relationship with its co-venturers at risk. She says that she did not disclose any of the Hillcroft Venture agreements to John because he competes directly with the co-venturers for work in the construction field.
- [26] In June 2018, the CPL was discharged by consent.
- [27] John, in his 5th and most recent affidavit, sworn November 20, 2018, characterizes Cathy-Anne's mortgaging of the GEAR lands as use of title "to finance a shady and potentially high-risk development [that] could have a disastrous outcome for me".
- [28] An unaudited balance sheet of CVH in evidence shows, as of March 31, 2018, assets valued at \$1,489,553, against indebtedness of \$2,569,000. John alleges in his Notice of Civil Claim that CVH's indebtedness includes approximately \$1,919,000 owing to Bow View, which arises out of loans for the purchase of Lot 4 and development of the GEAR property.
- [29] Although neither the Notice of Civil Claim, nor John's Notice of Application, make allegations concerning Bow View, paragraphs 65 through 79 of John's 1st affidavit detail a series of allegations against Cathy-Anne respecting that corporation's finances, all under the heading "Shutting Me Out of Bow View". Included in these details are an allegation of fraud in respect of the reduction in his Bow View shareholder loan balance. In his 5th affidavit, he states that in view of these allegations a forensic audit will have to be undertaken.

Use of the GEAR Lands

[30] The parties are now in conflict as to John's access to the GEAR lands, and as to the lands' continuing use as an aerial park. Cathy-Anne has moved to sever ties with the group responsible for an annual paragliding event called the "Willi-XC". John is opposed to this. He says in his 4th affidavit, sworn October 12, 2018:

10. Cancellation of the Willi-XC would hurt me personally as paragliding is my passion and I take great personal pride in owning the business that hosts Canada's premier paragliding event. Cancellation of the Willi-XC would also impair CVH's relationship with the paragliding community, and it would drive the event, and paragliders, to develop a competing landing field.

[31] He states further, in his 5th affidavit filed November 20, 2018, that:

18. we had always wanted the GEAR Property to be a family campground, and it always has been, and family camping has been a majority of the revenue. Having the pilots land at the GEAR Property was an attraction to family campers, and it also added to revenue when pilots camped, adding to the overall business platform. The pilots also provide repeat business, coming on a regular basis. Creating a flight park was the purpose of the GEAR Property, and that purpose included a family campground.

[32] Cathy-Anne, however, has determined that it will be more profitable to focus the marketing of the campground on other client groups. Recapping the 2018 season at GEAR, she describes in her 3rd affidavit, sworn November 13, 2018:

11. Despite the August forest fires, fire bans and the resulting smoky air, the campground continued to post strong revenues - more than \$235,000.00. Throughout the past three years the marketing focus has shifted from Hang glider pilots and paraglider pilots to family camping, bikers, hikers, kayakers, international travelers and wedding parties.

12. The marketing shift paid off since even though revenues were slightly down from last year because of the forest fires, the difference was less than 4%. The marketing focus will continue to shift away from the pilot clientele who are weather dependent and who contribute less than 5% to the overall revenues and instead will focus on the clientele that contribute to 95% of the revenues. So, the professional, analytical methodology approach to the business has generated positive financial results and thus will continue to be implemented.

[33] John alleges in his Notice of Civil Claim that Cathy-Anne has excluded John from all management decisions with respect to CVH, and that she has threatened to report him to the police if he attends at the GEAR property to manage it (i.e. to attend to inspection and maintenance of the facilities and to exercise oversight of the general manager).

- [34] As evidence of John interfering with the management of GEAR, Cathy-Anne relies on an affidavit sworn July 13, 2018 by a Ms. Reynolds, who has been GEAR's campground and facilities manager since May 1, 2018, reporting directly to Cathy-Anne. Ms. Reynolds attests to John entering the campground office on May 6, 2018, introducing himself as the campground owner and operations manager, and asking for information about the campground's facilities, including its water system, and the number of bookings; he said he would email her a list of questions about the campground's operations. Ms. Reynolds further states that John entered the office again on July 1, 2018 and asked her questions about the site's water system and RV storage. Ms. Reynolds states, "I told him that everything was working fine and we had no issues".
- [35] Cathy-Anne sent John a letter on July 1, characterizing his conversation with Ms. Reynolds as attempted interference in the operations of GEAR.
- [36] Ms. Reynolds further attests to an incident that occurred on that same July 1st when an alarm went off in the water system's wash house, which she says was due to a pressure failure in the wash house. She also says this failure would be extremely unlikely to occur accidentally. How this incident relates to John is only insinuated. John denies any responsibility for the incident.
- [37] Cathy-Anne further relies on information and belief, having been told by the former manager, a Ms. Wolfenden, that John left voice mails, texts and emails on her personal phone in April and May 2018, demanding information about the campground's operation; and that John said to a female employee (at some unspecified time) that she should change out of her work clothes, put on a bikini, and join an all-male group of pilots who were painting the pilots' shelter. The latter statement appears to be double hearsay, and is inadmissible.
- [38] Cathy-Anne produces an email she sent to John on August 17, 2018 warning him that no volunteer work groups were permitted at GEAR, due to liability insurance concerns arising out of potential risk of injury to a volunteer, or personal injury or property damage to third parties caused by volunteer activities, that the email details. The email is stated to have been prompted by information Cathy-Anne had received from Ms. Reynolds, that John was organizing a volunteer work group for September 2018. I infer that the aforementioned incident involving pilot painting activity was such a work group and that there has been a history of volunteer work groups at the site.
- [39] Attached as exhibit "T" to John's 1st affidavit, is a copy of an email message sent to him by Cathy-Anne on May 15, 2017, in which she told him to cease and desist from interfering in her management of CVH. John says that the context of this message was his protesting the sale of Lot 4. Referring to the corporate structure, the email concludes:

This structure is why you had no legal recourse available to you to come after either Bruce or me for the sale of the reflection ridge land. Your ignorance of corporate structure is astounding. In fact, keep pushing it and I will make sure you are not allowed to trespass on Gear's land.

[Emphasis added.]

[40] John has been deposed in the proceedings in Alberta, and has stated under oath that he recognizes the potential for conflict if there are blurred lines of authority in managing GEAR. Cathy-Anne relies on an excerpt from the transcript of his deposition, which includes the following:

A I mean, it's very obvious that not - - two people in a conflicting divorce settlement can't run - - an operation. We hire a general manager.

Q Do you recall sending a letter through counsel saying that you're no longer going to be involved with Golden Eco-Adventure Ranch?

A It became a point of frustration with the general manager where they got tired of getting directions from two people. So I said, "Okay, fine, I will back down".

The Applications

[41] John brings his application under s. 227(3) of the BCA, which grants the Court broad jurisdiction to remedy oppressive or prejudicial conduct by way of making any interim or final order it considers appropriate. He seeks restoration of the status quo ante, through being re-appointed as director of CVH pending a decision in this action on the merits; and alternatively, interlocutory injunctive relief to prevent dissipation of corporate assets.

[42] John seeks the following interlocutory orders:

- a) That Cathy-Anne be removed as director of CVH, and he be appointed in her place;
- b) That Cathy-Anne provide all accounting records of CVH, including an accounting of all proceeds of the sale of Lot 4;

And alternatively, if Cathy-Anne remains as director of CVH, he seeks:

- c) Interlocutory injunctions that restrain Cathy-Anne, without the agreement of John or further order of the Court, from:
 - i. Operating CVH in any manner other than the normal operation of the GEAR campground and aerial park;
 - ii. Entering into transactions or purchases of a value greater than \$5,000;
 - iii. Disposing of assets of CVH;
 - iv. Causing CVH to borrow funds, encumber its assets, or pledge security;
 - v. Causing CVH to pay wages, salaries, dividends or benefits to non-arm's length parties;

- vi. Using CVH to pay her legal costs in defending this proceeding;
 - vii. Causing CVH to refuse access to GEAR and its services;
 - d) Orders against Cathy-Anne:
 - i. That she provide detailed financial information related to CVH from 2015 to the present, and on an ongoing basis;
 - ii. That she repay to CVH \$40,500 in director's fees;
 - e) Orders:
 - i. Authorizing John to act on CVH's behalf in management of GEAR;
 - ii. Removing Bruce Fairley as lawyer for CVH, and that CVH obtain independent counsel;
- and, costs.

[43] Cathy-Anne seeks the following interlocutory orders:

- a) That John be restrained from filing any further CPL against the GEAR lands, without leave of the Court;
 - b) That John pay security for costs in this action;
 - c) That John be restrained from entering onto the GEAR lands at any time;
 - d) That John be restrained from communicating in any fashion with employees, contractors, guests, and managers of CVH;
- and, costs.

The Test for Interlocutory Injunctive Relief

[44] The test for an interim order in respect of the oppression remedy is the same generally as that which applies to an interlocutory injunction: see *Canada Snow Mountain Investments Co. Ltd. v. Miller Springs Ltd.*, 2015 BCSC 1117 [Canada Snow]; and, *Boffo Family Holdings Ltd. v. Mountainview Developments Ltd.*, 2010 BCSC 560.

[45] *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), aff'd [1991] 1 S.C.R. 62 [Wale], sets out a two-pronged test for an interlocutory injunction: whether there is a fair question to be tried, and whether the balance of convenience between the parties favoured an injunction. Under this test, the question of whether irreparable harm would be suffered by the applicant if the injunction was not granted, is an integral part of assessing the balance of convenience.

[46] Subsequently, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 [RJR-MacDonald] the Supreme Court of Canada restated the test as being three-pronged, with irreparable harm being a discrete element.

- [47] It has sometimes been said that the two-part and three-part tests are "functionally the same" (see *Canada Snow*, at para. 79), or have "no practical difference" (see e.g. *Progressive Automations Inc. v Jahromi*, 2018 BCSC 1015). However, in the BC Court of Appeal's most recent commentary on the tests, *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 [*Vancouver Aquarium*], Madam Justice Saunders remarked:
- [93] Most often the distinction is likely without practical effect, as I observed in *Coburn v. Nagra*, 2001 BCCA 607. On reflection, however, I cannot say the distinction is never without practical effect, depending on the meaning attributed to the term "irreparable harm" and the object of the posited harm
- [48] Regardless whether a two-part or three-part test is used, it is clear that the first part of the test - "a serious question to be tried" - has a low threshold:

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

RJR-MacDonald, p. 403.

- [49] With respect to the standard of proof that applies to the factor of irreparable harm, it is clear that there must be an evidentiary basis for the finding, whether or not it is a discrete element (as opposed to being subsumed within the balance of convenience test). In *Vancouver Aquarium*, Bennett J.A. acknowledged McLachlin J.A.'s (as she then was) caution in *Wale* that proof of irreparable harm should not be subject to too stringent a standard. However, Bennett J.A. also said:
- [60] there surely must be a foundation, beyond mere speculation, that irreparable harm will result. Interlocutory injunctive relief pending the trial of the issues is a significant remedy, and should be invoked only when the test in *RJR-MacDonald* is satisfied on a sound evidentiary foundation.
- [50] With respect to what role the factor of irreparable harm is to play in the analysis, the decision in *Vancouver Aquarium* is somewhat unusual in that Bennett J.A. and Saunders J.A. each took a different path, issuing separate reasons for allowing the appeal and setting aside the injunction issued by the Court below, while the third member of the panel, Mr. Justice Donald, agreed with both. Madam Justice Bennett appears to have applied the three-part formulation; she restated it at para. 37 of the reasons, and as she reviewed the law she treated "irreparable harm" and "balance of convenience" as discrete categories. At the same time, Bennett J.A. also cited approvingly the following passage from the decision of the Saskatchewan Court of Appeal in *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120 [*Potash Corp*]:

- [26] For the moment, let me observe that the strength of case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments.
- [51] Madam Justice Saunders, however, at para. 94, quoted from the two-part formulation described by Mr. Justice Lambert in *Canadian Broadcasting Corporation v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (C.A.) [CBC], where he said:
- [23] I would also adopt and follow the approach of Madam Justice McLachlin [in Wale] to the second prong of the test, namely the assessment of balance of convenience. I would summarize that approach in this way: in assessing the balance of convenience a judge should consider those points: – the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.
- [24] It should be noted that the strength of the applicant's case is a separate factor, which should be considered under the second prong of the test, quite apart from the question under the first prong of the test of whether the applicant has established a fair question to be tried. But the assessment of the relative strength of the parties' cases must recognize the degree to which those cases have not yet been revealed because of the nature of the evidence and the way it has been presented on the injunction application, which may be markedly different from the way it would be presented at trial.
- [52] Madam Justice Saunders then concluded in *Vancouver Aquarium*:
- [95] Respectfully, and recognizing that *RJR MacDonald* did not disapprove *Wale*, I would adopt the approach of *CBC*, recognizing that irreparable harm is an important factor to be considered in balancing the interests of justice, but its absence does not preclude an injunction where such is considered appropriate by a judge exercising the inherent jurisdiction assigned by the *Law and Equity Act*, R.S.B.C. 1996, c. 253.
- [53] I therefore approach the present applications on the basis that proof of irreparable harm is at the very least an important component of the test for an interlocutory injunction.

The Oppression Remedy

[54] Before I turn to applying the test, something should be said as to the nature of the oppression remedy, as it is foundational to John's claim in the present action and to his application for interlocutory relief. The court's power to relieve against the consequences of oppressive conduct is broadly described in s. 227 of the BCA:

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.

[55] The scope, and limitations, of the remedy are described in the following passages from the decision of Madam Justice Newbury, unanimously concurred in, in 1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd., 2016 BCCA 258 [1043325]:

[48] As observed in Rea [v. Wildeboer, 2015 ONCA 373], the oppression action is clearly a "personal" one, as opposed to a representative or derivative one. The "intersection" or overlap between derivative and oppression actions is a topic much discussed in the cases; but at issue here is the more obscure question of the limits on personal complaints that may be pursued under s. 227. Is any shareholder who has a complaint against a company for any wrong, entitled to invoke s. 227? The answer lies in a consideration of the kinds of rights and expectations protected by, and types of conduct that may be challenged under, the oppression provision.

[49] First of all, s. 227 contemplates that the conduct complained of relates to the way in which the "affairs of the company" are being or have been conducted or the directors' powers have been exercised, or to the passage or proposed passage of a resolution. As Markus Koehnen notes in *Oppression and Related Remedies* (2004), the corporate legislation of many of the provinces (although not of British Columbia) defines "business or affairs of the corporation" for purposes of the oppression provision to mean the relationships among a corporation and its shareholders, directors and officers, etc., but not to include the business carried on by the corporation. (At 110.)

[50] Although each oppression case is fact-specific, certain types of conduct have commonly been found to constitute oppression. Kevin P. McGuinness in *Canadian Business Corporations Law* (2nd ed., 2007) offers this overview:

Conduct that is found to be unfairly prejudicial or oppressive in one case may not necessarily be found in another, even though the factual setting of the two cases is only slightly different. Still, it is worthwhile to summarize some of the decided case law that is indicative of the range of circumstances in which relief may be available. The appropriation of a corporate opportunity can amount to oppression or unfairly prejudicial conduct. It is oppressive for a controlling shareholder to treat the corporation as if it were wholly owned, as, for instance, by causing it to pay repeated and large personal expenses. It is also oppressive for a controlling shareholder or director to orchestrate the business or affairs of a corporation (e.g., by making discretionary or unjustified payments) to frustrate or circumvent his or her obligations under a contract relating to the securities of a corporation. Violations of the Securities Act that do not give rise to a civil cause of action under that Act may also be held to constitute oppression to allow relief to be granted under section 248 [of the Ontario Business Corporations Act]. Defensive tactics employed to defeat a hostile takeover bid may also be oppressive. Nominee directors may be guilty of oppression where they are caused or required by the shareholder who nominates them to make its interest paramount and to disregard or downplay the interests of other shareholders.

The classic case of oppression arises where the complainant has effectively been denied the very benefit he or she sought to obtain when joining the corporation in the capacity of a director, officer, or shareholder or when investing in it as a security holder. [At §13.27-8; emphasis added.]

The author also suggests at §13.92 that:

the [oppression] remedy is available where a dispute relates to conduct by the corporation and its officers. It is not available where the dispute is between two shareholders as such, and not the corporation - the dispute must relate to the conduct of the corporation in itself. Nor is relief available merely because of some dispute between two shareholders outside the corporate context - for instance, in the case of the breakdown of a marriage. [Emphasis added.]

[51] Koehnen, *supra*, describes some of the outer limits of the remedy:

To some degree the conduct in question must and should relate to a corporation. Defining the degree to which oppression should require corporate conduct can be tricky. At the easy end of the spectrum are disputes involving a defendant who exercises no corporate role at all. For example, in *Thomson v. Quality Mechanical Service Inc.*, [(2001), 56 O.R. (3d) 234 (S.C.J.)] the plaintiff was one of two 50% shareholders. The corporation's banking resolution required the signature of both shareholders on cheques. In breach of this resolution, the bank honoured cheques bearing the signature of only one shareholder. The plaintiff's action against the bank for oppression was dismissed on a preliminary motion. While the bank's conduct might amount to a breach of its contract with the corporation, the shareholder had no oppression claim because the bank's conduct did not fall within paragraphs (8)(2)(c) of s. 241(2) [of the Canada Business Corporations Act]. Similarly, the oppression remedy does not include purely personal disputes

between shareholders. Thus, in *Jarmon v. Brown & Gulfstream Cruises Ltd.*, the court found no oppression where the two shareholders were spouses in the midst of a marriage break-up and one spouse sought to wind-up the corporation as a means of effecting division of property. Finally, the oppression remedy does not include the conduct of a defendant who happens to play a corporate role but whose conduct does not involve his corporate role. Thus, where a shareholder was also a mortgagee to the corporation, the shareholder's conduct in foreclosing on a mortgage did not fall within the oppression remedy. The results in these cases, it is submitted, makes sense. The relationships at issue were not properly governed by corporate law but were governed by legal rules applying to banking, divorce or mortgages.

Some courts have used the requirement for corporate activity to draw a distinction between the "personal" and "corporate" conduct of directors. Actions attributable to officers or directors that are not attributable to the corporation do not amount to oppression

The requirement for corporate conduct has also lead courts to exclude disputes about shareholder agreements from the ambit of the oppression remedy because such agreements are private contracts that fall outside the affairs of the Company. [Citing *Johnston v. West Fraser Timber Co.* (1982), 37 B.C.L.R 360 (C.A.) lve. to app dismissed (1982) 45 N.R. 538n.] [At 106-8; emphasis added.]

[52] The author suggests that requiring "corporate conduct" - i.e., conduct of directors or officers acting in their "corporate capacity" - as a prerequisite to an oppression remedy reflects too narrow a view. He emphasizes that the purpose of the remedy is to "prevent unfairness", which can come in many forms. He suggests the focus should not be on the conduct but on its effect on the complainant. In the leading Canadian case, *BCE Inc. v. 1976 Debentureholders* 2008 SCC 69, the Court suggested at para. 65 that the conduct of shareholders may also support a case for oppression.

[54] In summary, while oppression is a "personal" claim, not every personal claim that a shareholder may assert against a corporation will constitute oppressive or unfairly prejudicial conduct. The oppression or unfair prejudice must generally be suffered by the "shareholder" (as defined) qua shareholder: see *Dilligenti v. R.W.M.D. Operations Kelowna* (1976), 1 B.C.L.R. 36 (S.C.) at 41; *Burdeny v. K & D Gourmet Baked Foods & Investments Inc.* (1999), 48 B.L.R. (2d) 16 (B.C.S.C.) at para. 20; *Safarik v. Ocean Fisheries Ltd.* (1995), 12 B.C.L.R (3d) 342 (C.A.) at para. 85; *Stone v. Stonehurst Enterprises Ltd.* (1987) 80 N.B.R. (2d) 290 (Q.B.) at 305, quoted with approval in *Naneff v. Con-Crete Holdings Ltd.*(1995), 23 O.R. (3d) 481 (C.A.) at 489. On the other hand, as Naneff illustrates, where the complainant is able to show an entire course of oppressive conduct which includes another cause of action (in *Naneff*, wrongful dismissal), that cause may also be remedied under the oppression provision.

[Emphasis in original.]

Discussion

- [56] I deal first with John's application.
- [57] The application easily meets the first element of the test for an interlocutory injunction. The allegations are not frivolous or vexatious. There are allegations to be tried.
- [58] The difficulty with John's application is in respect of the second element, the balance of convenience.
- [59] I consider first the issue of irreparable harm, bearing in mind the factors enumerated by Lambert J.A. in CBC. John says in his Notice of Application that he will suffer irreparable harm if denied an injunction, in three respects:
- (1) He will be deprived of enjoyment of the GEAR Property as Cathy-Anne will deny him access, which cannot be compensated in damages;
 - (2) Denying him access to the GEAR Property would give Cathy-Anne a bargaining advantage in the Alberta Divorce Action; and
 - (3) Cathy-Anne would be free to enter into further related-party transactions or dissipate corporate assets, and there is no guarantee that he would discover such transactions, nor be able to recover compensation for them.
- [60] In respect of irreparable harm, I consider the following factors:
- a) It must be said that these risks of irreparable harm relied upon by John relate only to a small number of the multiple forms of injunctive relief sought against Cathy-Anne.
 - b) I do not find that depriving John of enjoyment of the GEAR Property, even if that were to come about, could not be adequately compensated in damages. Loss of enjoyment of activities and pursuits is a common component of awards of general damages in tort actions. There is no principle of law that places the prospective loss of enjoyment John says he would face, in a different category. This alleged potential harm is therefore not "irreparable".
 - c) John presents no plan for this family addressing its debt levels; certainly, no plan that could address the significant personal and corporate indebtedness without using the GEAR lands as security against business debt, as Cathy-Anne has done through the Hillcroft Venture. The whole flavour of John's affidavits is that he should be free to pursue his passion of aerial sports, without regard to the financial consequences of underutilizing the GEAR lands. The risk to Cathy-Anne's financial security, and the continuing financial needs of the children, if an injunction is granted allowing him control of CVH, and the difficulty of providing adequate monetary compensation against any such risk that comes to fruition, considerably outweigh the risk (which I find is minimal) of leaving control in Cathy-Anne's hands. And this is not to mention John's own long-term financial interests; he says in his 1st affidavit that he has no savings, RRSP's, or pension, and that his nest egg consist of his equity in Great Divide (and through Great Divide, CVH) and Bow View. If that is the case, he should be presenting a workable plan under which that equity can be exploited for the benefit of all.

- d) The prospect of Cathy-Anne disposing of CVH's property for less than full market value, or otherwise dissipating corporate assets, appears remote. John presents no evidence that the Lot 4 sale was at less than fair value. He has not demonstrated that Cathy-Anne is acting irresponsibly or other than in the best interests of Great Divide and CVH. What she has done with the proceeds of her undertakings is quite another thing; if John can establish oppression, or some other ground for liability, he may be entitled to an accounting. But that is not a basis for granting interlocutory relief.
- [61] In light of these considerations, the element of irreparable harm is not made out.
- [62] The second factor enumerated in CBC, in determining the balance of convenience, is the question of which party has acted to alter the balance of their relationship and affect the status quo. It could be said that was Cathy-Anne, who acted to remove John from control of CVH. But that act on her part was preceded by the parties' separation. That, in my view, was the real point at which the status quo changed, as it made manifest the need for the parties' finances to be put on a sounder footing, and for the parties to move away from a "business as usual" approach to managing GEAR and CVH's equity in GEAR. Neither party can be faulted for the separation; it is a neutral factor. To the extent that her removing John from control of CVH may be considered, it happened against the backdrop of the parties' divorce proceedings and the contest over control of Bow View; it is not a factor that should be given much weight.
- [63] The third factor I look to in considering in the balance of convenience in this case is the strength of the applicant's position. In weighing this factor, I consider three aspects of the circumstances to be particularly significant.
- a) If there has been oppressive conduct here, it originated not in John being removed as director of CVH - which Great Divide, being the sole shareholder, was undoubtedly permitted to do - but in Cathy-Anne's use of her powers as Chair of Great Divide to accomplish that end, potentially to the detriment of another Great Divide shareholder. In other words, the locus of the conduct alleged to have oppressive lies in the affairs of an Alberta corporation, subject to the Alberta courts. John's decision to pursue his allegations of oppression in British Columbia, rather than in the more natural forum of Alberta, raises a red flag, given that there has been at least one significant ruling against him in the consolidated Alberta proceedings.
- b) The complaints regarding the orientation of the business of GEAR away from aerial sports activities are in respect of the business of the company, as distinguished from corporate affairs. There is no shareholders' agreement conferring on John rights to make use of the GEAR property, or other assets of Great Divide. Further, even if Cathy-Anne's actions have been to the detriment of CVH, they were to the detriment of the company as a whole, not to John's shareholding interests in particular; it is not plain and obvious that they were "oppressive to one or more of the shareholders" within the meaning of s. 227 of the BCA. The extent to which John's affidavits allege misconduct on the part of Cathy-Anne in relation to

Bow View demonstrate how intertwined the allegations are with those relevant to the ongoing proceedings in Alberta. The gravamen of John's complaints is the use and possession of family property in the context of an ongoing divorce proceeding. Aside from the allegations of wrongful payment of director's fees, the misconduct alleged to have been committed by Cathy-Anne does not fit neatly within the scope of shareholder oppression.

- c) John's evidence simply does not make out a strong case of malfeasance on the part of Cathy-Anne. As I have noted, there is no evidence that the Lot 4 sale was at less than fair value. Likewise, there is no evidence that the Hillcroft Venture is particularly risky - certainly not that it is any more risky than any other real estate-related venture the parties engaged in over the years, including CVH's purchase of Lot 4. Cathy-Anne presents a prima facie case for entitlement to director's fees. Her efforts seem focused on promoting the best interests of CVH through managing its assets to the benefit of its shareholders. In contrast, John's complaint is that he is no longer able to use the GEAR lands to pursue his personal interests. John argues that he has a reasonable expectation to the use of the GEAR lands that is deserving of protection under the oppression remedy. But, the circumstances of the parties' indebtedness, and the need eventually to divide family property, are such that in the absence of a plan to manage the parties' debt, John does not have strong grounds for believing that he will continue to enjoy unfettered use of the GEAR lands beyond the conclusion of the Divorce Action. Finally, his rush to file the CPL against the GEAR lands to further his personal interests, without regard to how that step might be to the detriment of CVH's business in relation to potential breaches of the development agreement under which the Liberty Mortgage was granted, calls into questions his ability to manage or resume directorial duties for CVH dispassionately, in a manner that will advance the best interests of the company and others concerned.

[64] The balance of convenience does not lie in John's favour.

[65] The relief sought in respect of Cathy-Anne providing accountings and making disclosure of financial records is not properly grounded as interlocutory injunctive relief in the context of oppression allegations. John is at liberty to pursue interlocutory orders within the present action to the extent provided for by the discovery mechanisms in the Supreme Court Civil Rules.

[66] As for Mr. Fairley's representation of both Cathy-Anne and CVH, a company acts through its directors, and Cathy-Anne is CVH's sole director. There is no apparent conflict of interest in their joint representation.

[67] With the sole exception of enjoining Cathy-Anne from interfering with John's use and enjoyment of the GEAR lands as an aerial sports participant and camper, which I describe further below, John's application for interim relief under the BCA and interlocutory injunctive relief is dismissed.

- [68] The order sought by Cathy-Anne restraining John from filing, without leave of the Court, any further CPL against the GEAR lands, was not strongly opposed by John. The order is appropriate in the circumstances.
- [69] Cathy-Anne seeks an order that John pay security for costs. Mere impecuniosity, and inability to pay costs will on their own seldom be sufficient grounds, in the case of a natural plaintiff. The comments of Mr. Justice Shaw in *Fraser v. Houston* (1997), 36 B.C.L.R. (3d) 118 (S.C.), are apposite:
11. The conclusion I draw from the foregoing authorities is that while the court must have jurisdiction to do what is necessary to prevent its jurisdiction from being abused, the court exercising this power must weigh carefully the right of our citizens to have access to the courts. In my view, the court should not make an order which would preclude the right of access except in egregious circumstances amounting to a likely abuse of the court's jurisdiction.
 12. In an ordinary case where a resident plaintiff is not sufficiently wealthy to be able to pay the costs of a defendant if the plaintiff loses the lawsuit, that, in itself, would not justify an order for security for costs being made. The bringing of a lawsuit without sufficient funds to pay loser's costs would clearly not be an abuse of the court's jurisdiction. The public would simply be seeking recourse to the courts which must be available to all members of the public whether they are wealthy or poor.

See also *Tordoff v. Canada Life Assurance Co.* (1985), 64 B.C.L.R. 46 (S.C.), where Proudfoot J. (as she then was) commented (at 50) that the power to order special costs against an individual plaintiff should be exercised "sparingly and indeed under very special circumstances".

- [70] I have described above my concerns with the weakness of John's case against the defendants, and what I have described as a "red flag" raised by the pursuit of the oppression claim in British Columbia rather than Alberta. I have also considered the scope of John's allegations of misfeasance on the part of Cathy-Anne, which include fraudulent conveyance, and the possibility that his having made such claims could expose him to liability for special costs. On balance, however, I do not view these factors as "egregious circumstances" such that security of costs should be imposed as a precondition to John's access to the courts.
- [71] With respect to his access to the GEAR lands, though the evidence of John having interfered in management of CVH is slight, there is some evidence that he has asserted a right to query the on-site manager. Also, he recognizes that having dual lines of authority over management of GEAR is untenable. The injunctive relief sought against him, however, is overbroad. Cathy-Anne's email of May 15, 2017, threatening to have John barred from the property, in reaction to his opposition to the sale of Lot 4, raises significant concern as to whether her claims that his presence on the property presents a risk are being made in good faith. I have found that barring John absolutely from use of the premises would not lead to irreparable harm that would justify an interlocutory injunction giving John control over CVH. But that does not mean John should not, as a shareholder of Great Divide, and in

recognition of his history of use, be allowed some limited access pending a trial on the merits.

[72] Therefore, I order that John is to be restrained from communicating with CVH's employees, managers and contractors in any manner that implies or asserts a right to control, direct, or query them in relation to their activities in relation to GEAR and the GEAR property. However, John will be at liberty to continue to use the GEAR lands as a participant in aerial sports activities and camping, within the normal course of GEAR's operations and under GEAR's rules. Cathy-Anne is to be restrained from interfering or causing interference in John's use of the GEAR lands for those purposes, and nothing will restrain John's ability to communicate with CVH's employees, managers and contractors for those purposes.

[73] The costs of this application will be in the cause.

"A. Saunders J."

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