

CANADA / JUDGMENT

## Melcer Estate v. Boxer

2022 BCCA 143

COURT

British Columbia Court of Appeal

DECIDED

19 April 2022

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2022 BCCA 143 Melcer Estate v. Boxer

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Melcer Estate v. Boxer,

2022 BCCA 143

Date: 20220419

Docket: CA47111

Between:

Lee Watson in his capacity as personal representative of  
the Estate of George Melcer

Respondent

(Petitioner)

And

Jacob Boxer, also known as Jake Boxer, Regina Boxer, Boxer Holdings Ltd. and Radio City  
Investments Ltd.

Appellants

(Respondents)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated November 6, 2020 (Melcer Estate v. Boxer, 2020 BCSC 1686, Vancouver Docket S1610318).

Counsel for the Appellants:

A.N. Epstein

Counsel for the Respondent:

J. Goulden, Q.C.

S.J. McCalla

Place and Date of Hearing:

Vancouver, British Columbia

December 10, 2021

Place and Date of Judgment:

Vancouver, British Columbia

April 19, 2022

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Griffin

Summary:

The parties each owned 50% of the shares of Radio City Investments Ltd., which was in deadlock. To resolve the deadlock the judge below ordered a valuation of the company, following which the appellants could either purchase the respondent's shares in the company for 50% of its highest fair market value or it would be wound up and sold. The parties jointly appointed a valuator who prepared a draft valuation. Both parties identified concerns with the draft valuation, but did not agree on whether the valuation required revision. The respondent applied to the court for an order compelling its finalization. The appellants opposed the order sought and asked the court to direct the valuator to correct what they considered to be inadequacies in the draft valuation. The judge granted the order requested by the respondent. The appellants submit that the judge erred in law in considering matters that were not before her. They also submit that the judge erred in determining that it was just and equitable to order finalization of the valuation given the errors they identified. Held: Appeal dismissed. The judge did not rule on a matter that was not before

her; the respondent directly raised the concerns with the draft valuation in their written and oral submissions. The judge also did not err in ordering the finalization of the draft valuation. The determination of a just and equitable solution to a corporate deadlock is highly discretionary. It was open to the judge to place weight on the interest of concluding the valuation process when faced with contentious and uncertain claims about inaccuracy and the risk of prejudice to the respondent arising from further delay.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] This appeal concerns the last in a series of orders made by Justice Forth following contentious litigation to resolve a deadlock in the management of Radio City Investments Ltd. ("Radio City") and the dispute between its two shareholders. Radio City is a closely held corporation that owns two significant assets: an apartment building located on Burnaby Street in Vancouver (the "Burnaby Property") and a minority interest in Canaland Developments Ltd., a closely held company that owns an apartment building on West 7th Avenue in Vancouver (the "West 7th Property"). An earlier order, dated May 18, 2018 (the "2018 Order"), required the parties to appoint a business valuator to prepare a valuation of Radio City. It also granted the appellant, Boxer Holdings Ltd. ("Boxer Holdings"), the option to purchase the share in Radio City held by the respondent. If Boxer Holdings did not exercise the Option, the 2018 Order provided that Radio City would be wound up and sold.
- [2] The parties jointly retained Daniel Sturgess to provide the valuation. He delivered a draft report in October 2019 which provided an estimated range of values representing the fair market value of the company. The draft valuation contained an error which affected Mr. Sturgess' opinion as to the low end of that range of fair market values. He had deducted the full amount of the notional taxable capital gain on disposition of the Burnaby Property, rather than the taxes on that notional gain. This had the effect of understating the low end of the range of fair market values by \$1,885,207. He advised the parties of this error in an email dated December 12, 2019.
- [3] The parties exchanged correspondence with Mr. Sturgess about the draft report. There was no dispute about the error identified by Mr. Sturgess; the parties agreed that the correction was required. The exchange of correspondence also raised other potential concerns arising from the draft valuation. Eventually, the parties brought applications with a view to obtaining directions to the valuator for finalization of the valuation. The respondent sought an order that would direct the parties to instruct Mr. Sturgess to finalize the valuation by correcting the identified error. The appellants responded by seeking an order that would require Mr. Sturgess to "correct the inadequacies in his report and issue his final report".

- [4] On November 6, 2020, after hearing the parties' applications, the judge ordered the parties to instruct Mr. Sturgess to finalize his report (the "Final Valuation"), subject only to changes that Mr. Sturgess, "in his sole discretion, deems necessary to address the error he identified in his email of December 12, 2019" (the "Order"). In accordance with the 2018 Order, the Order specified that the highest fair market value of Radio City "means the highest value in the range of fair market values identified by Mr. Sturgess in his Final Valuation."
- [5] The appellants sought and were granted leave to appeal. They recognize that some deference is owed to the judge's discretionary order, but say the judge made an extricable error in law by compelling finalization of the report through correction of the identified error without also requiring the valuation to be amended to correct other (allegedly fundamental) errors identified by the appellants. The appellants also say the judge erred in principle, or in the exercise of her discretion, by making an order that effectively required the appellants to pay the respondent's tax liability if they decided to exercise the Option.
- [6] I am of the view that the appellants are unable to identify any error in fact or law or in the exercise of the judge's discretion that would permit this Court to intervene. I would dismiss the appeal.

## Background

- [7] Radio City was incorporated by Joseph Boxer and George Melcer in 1956 as an investment vehicle. Each owned one of the two voting shares in Radio City.
- [8] Mr. Melcer passed away in January, 2000. Lee Watson, who had been Mr. Melcer's accountant, was granted administration of the Melcer Estate (the "Estate"). On May 3, 2001, the Estate's share in Radio City was transferred to Mr. Watson in his capacity as personal representative of the Estate. Mr. Watson was a director of Radio City until 2010.
- [9] In 1977, Joseph Boxer transferred his share in Radio City to Boxer Holdings. He passed away in 1989. His wife, Regina Boxer, replaced him as a director of Radio City and remained in that role until April 3, 2013. On that date, Joel Watson, the son of Lee Watson, replaced her as a director of the company. Jacob Boxer, the son of Joseph Boxer, replaced Lee Watson as a director of Radio City in 2010, and has been both an officer and director of the company since that time.
- [10] The difficulties in the management of Radio City have come about in part because Mr. Melcer's will prohibited his trustees from entering into any arrangement that would result in the transfer of his share in Radio City to "the present holders or the descendants of the present holders of the remaining issued and outstanding shares" in the company. It also provided that the Estate's share be held for the longest time period permissible by law.
- [11] On November 7, 2016, the Estate filed the petition in this matter. It sought a declaration that Boxer Holdings had conducted the affairs of Radio City in a manner that was oppressive or unfairly prejudicial to the Estate. Jacob Boxer and Regina Boxer were named as respondents

because of their positions as directors and officers of Radio City, and because of their control of Boxer Holdings. The Estate sought orders requiring the Boxer parties to provide a full accounting, that they purchase the Estate's share in Radio City at fair market value, or that the company be wound up.

- [12] The Boxer parties opposed the application for a declaration that the affairs of Radio City were being operated in an oppressive manner. They alleged that the inaction and lack of involvement of Lee and Joel Watson as directors in the management of Radio City had caused Boxer Holdings to suffer oppression. However, they conceded there was a deadlock in the management of the company. They alleged that Boxer Holdings had made offers to purchase the Estate's shares but that those were rebuffed on the basis of the language in Mr. Melcer's will. Given the lack of any mechanism to deal with the impasse, the Boxer parties sought an order that the court read a shotgun offer clause into the shareholders' agreement to allow the parties to determine fair market value or that the court otherwise use its broad discretionary powers to resolve the deadlock.
- [13] In reasons indexed as *Melcer Estate v. Boxer*, 2018 BCSC 775, the judge dismissed the Estate's application for an order that the affairs of Radio City were being conducted in an oppressive or unfairly prejudicial manner, and made the 2018 Order, which provided in part:
6. A valuation of Radio City (the "Valuation") shall be obtained as follows:
    - (a) within 14 days of this order, the Petitioner and the Respondents (the "Parties") shall make reasonable efforts to jointly appoint a qualified business valuator (the "Valuator") to perform the Valuation, and to provide joint instructions to the Valuator;
    - (d) subject to agreement by the parties, or further order of the Court, the Valuator shall complete the Valuation within 60 days of appointment;
  7. Within 30 days of receipt of the Valuation, Boxer Holdings has the option to purchase the Petitioner's shares in Radio City at 50% of the highest fair market value of Radio City determined by the Valuation (the "Option"). If, for any reason, Boxer Holdings does not exercise this Option to purchase the Petitioner's shares in Radio City, Radio City shall forthwith be wound up and sold. If the Parties are unable to agree on the terms of the winding up within 14 days of Boxer Holding failing to exercise the Option, then the Parties, or any one of them, may apply to this Court for further orders concerning the terms of the winding up.
- [14] The parties took some time to resolve the terms of the appointment of the valuator and appeared before the judge on September 10, 2018 to clarify the terms of the instruction letter to the valuator. She directed that the valuator "should consider any tax implications of Radio City." She also granted the parties leave to seek further directions.
- [15] Mr. Sturgess, a business valuator with Crowe MacKay, was jointly retained to provide the valuation of Radio City. In order to do so he retained Marion Lochhead, a real estate appraiser with Burgess Cawley Sullivan & Associates Ltd., to provide an appraisal of the two

properties. Mr. Sturgess delivered his report in draft form, dated October 21, 2019. That report attached the Burgess Cawley appraisals for the two properties. The Burnaby Property was appraised at \$7,630,000 which was noted to be almost \$4.3 million lower than assessed value. The West 7th Property was appraised at \$29,700,000, which was more than \$8.9 million less than assessed value. Relying on those appraisals, Mr. Sturgess provided his opinion of the range of fair market values for Radio City.

- [16] On December 12, 2019, Mr. Sturgess sent an email advising the parties of the error identified in para. 2 of these reasons. He gave the parties an amended schedule to the report that corrected his calculation for the range of fair market values. He eventually prepared an Amended Draft Valuation report that reflected that correction. The amended report changed the opinion of fair market value of Radio City from a range of "between \$11.57 million and \$16.78 million (with a midpoint of \$14.2 million) to between \$13.41 million and \$16.78 million (with a midpoint of \$15.1 million)."
- [17] In arriving at the low end of the range of values, Mr. Burgess deducted the notional capital gains tax that would be payable on an immediate sale of the properties as well as the estimated selling costs. For the high end of the range of values, he deducted the notional foregone tax shield. In order to do that, he calculated the split between land and building values for each property based on the split in those values shown on the tax assessments for each property. He did this because Ms. Lochhead had not given any opinion as to building values for the properties. The building value is needed to notionally determine the foregone tax shield. The higher the building value, the greater the foregone tax shield.
- [18] After delivery of the Amended Draft Valuation, the appellants sought further clarification of Mr. Sturgess' calculations and methodology, in particular as they related to consideration of the latent tax liability of Radio City and the apportionment of the value of the Burnaby Property as between the land and improvements because of its impact on the foregone tax shield. Counsel for the appellant wrote to Mr. Sturgess on February 21, 2020 with inquiries about those subjects. Before a response was provided, the parties appeared before the judge on March 5, 2020 for directions. No order was entered from that appearance, but the judge directed the valuator to provide a response to the letter by March 13, 2020. The parties were given until March 27 to consider the response and to provide instructions to the valuator to finalize his report. They were also granted leave to apply, yet again, for directions.
- [19] Mr. Sturgess provided his response to counsel's letter on March 13, 2020. The appellants were not satisfied with the response. After some delay that arose from the COVID-19 pandemic, the Estate brought the application that resulted in the Order. It asked the court to direct the valuator "to finalize his draft report within 7 days of this order subject only to the changes that the Valuator, in his sole discretion, deems necessary to address the error identified" in his email of December 12, 2019. The Estate also sought an order directing that "the reference to the 'the highest fair market value of Radio City determined by the Valuation (the 'Option') at paragraph 7 of the [2018 Order], means the highest value in the range of fair market values identified by Valuator in his Final Valuation."

- [20] The appellants opposed the orders sought by the respondent. They argued that the valuator "failed to properly incorporate the relative values of the land and improvement for the [Burnaby] property in the valuation contained in the draft report" and had also "failed to properly account for the latent tax liability of the company, which would result in a valuation at the low end of the fair market value range established in the report." They asked the court to direct the parties "to instruct the Valuator to correct the inadequacies in his draft report and issue his final report."
- [21] The judge made the Order in the terms sought by the respondent and awarded costs of the application to the respondent.

## Reasons

- [22] The judge observed that the applications raised two issues: what directions the court should provide for finalization of the valuator's report; and whether it should provide further direction respecting the value to be used in exercising the Option.
- [23] With respect to the directions to be provided for finalizing the report, the judge observed that the methodology for valuation "rests squarely within the specialized expertise of a qualified business valuator and outside of the Court's knowledge and expertise." The judge then set out the concerns highlighted by the Boxer parties, focusing on the split between land and building value used by the valuator for the Burnaby Property. The judge also listed concerns raised by the Estate about the draft valuation, prefacing that list with this comment:
- [35] I am concerned that if the door is opened for the respondents to have the Valuator address the land/building split, the same door should be left open for the petitioner to address concerns they have with the Draft Report. Those initial concerns were set out in Mr. Goulden's letter dated November 29, 2019:
- [24] After listing those concerns, the judge referred to the Estate's concerns about Ms. Lochhead's appraisals, referring to review reports for each property obtained by the Estate that estimated significantly higher property values for both properties (the "Garnet Williams reports"). She also referred to a report that was prepared by McEwen Valuation & Forensic (the "McEwen report") in response to questions raised by the Estate's counsel. She also noted that the Boxer parties had consulted two real estate brokers to provide views on changes in the real estate market's performance over the previous 12 months. She ultimately concluded that she should not provide additional directions to the valuator:
- [40] The Valuator was alerted to the respondents' concerns with the Draft Report. The only change, in his professional judgment, that needed to be made was to account for the error he identified.

- [41] I am not convinced that the door should be unlatched to allow the parties to challenge the opinion of the Valuator. This will create the proverbial slippery slope, with each party seeking to raise issues they say will change the ultimate valuation in their favour.
- [42] I conclude that there needs to be an end to the parties' relationship and it can only be achieved if the May Order is now complied with.
- [25] The judge then turned to the second issue: whether further directions should be provided respecting the range of value to be used in exercising the Option. She referred to the McEwen report and an opinion letter prepared by Don Spence, a valuator retained by the Boxer parties. In that letter, Mr. Spence noted that the valuator did not factor in "an illiquidity discount" for the high end of the range of values. The Boxer parties also argued that it would be unfair for them to have to exercise the Option at the high end of the range of values when any other purchaser of the properties under a liquidation would be able to purchase the properties at the low-end value.
- [26] The judge referred to the valuator's comments in his March 13, 2020 letter and observed that he did not address the illiquidity discount referenced by Mr. Spence. However, she concluded at paras. 51 and 52 that she should not "second guess the Valuator and the judgment he exercised on how to calculate the low and high ends of the fair market value of the properties", and was not convinced it was just and equitable to vary the 2018 Order "to allow Boxer Holdings Ltd. to offer to purchase 50% of Radio City at the low end of the fair market value."
- [27] In accordance with the Order, the valuator delivered his final report on November 20, 2020 setting the high range of the value of Radio City at \$16,780,000. Pursuant to the Order, Boxer Holdings was required to pay one half of that amount to exercise the Option by December 21, 2020. The appellants filed a notice of application for leave to appeal on November 13, 2020 and applied to stay the Order. That application was dismissed by Justice Griffin for reasons indexed at 2020 BCCA 380. On December 21, 2020, the appellants exercised the Option and purchased the Estate's shares.

## On appeal

- [28] The appellants' factum raises three grounds of appeal. I will restate the grounds to account for some overlap in the grounds described in their factum, and to give separate consideration to an extricable legal error that the appellants argue was made by the judge:

1 Did the judge make an extricable error in law by ruling on a matter that was not before her - whether the valuator had failed to consider factors that would tend to increase the range of values for Radio City?

2 Did the judge err in fact and law, or in the exercise of her discretion, in determining that it was just and equitable to order the parties to instruct the valuator to finalize his report without further amendment?

## Standard of review

- [29] The parties acknowledge that the appeal primarily raises questions of mixed fact and law. Absent an extricable question of law, the more stringent palpable and overriding error review standard is applicable. This requires that an error must be plainly seen and material: *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 5 - 6, 28 - 36; *Salomon v. Matte-Thompson*, 2019 SCC 14, at para. 33.
- [30] In addition, the Order arises from the respondent's application for an oppression remedy under the Business Corporations Act, S.B.C. 2002, c. 57, and from the appellants' response to that application in which they asked the court to "use its broad discretionary powers to resolve the deadlock" that had developed in the corporate governance of Radio City. The judge's orders were discretionary and, accordingly, deference is owed to her decision. This Court has repeatedly stated that such orders are subject to the palpable and overriding error standard of review. This was recently confirmed in *Surrey Knights Junior Hockey v. The Pacific Junior Hockey League*, 2020 BCCA 348:
- [67] Orders made granting relief from oppression under the Societies Act are subject to the same standard of review as such orders made under comparable corporation statutes. Whether conduct amounts to oppression or unfair prejudice is a question of mixed law and fact, and in the absence of an extricable error of law, is reviewable on a palpable and overriding error standard. A finding of reasonable expectations is a finding of fact that is afforded similar deference. Remedies are discretionary, and owed deference unless they are based on errors of law, erroneous principles, irrelevant considerations, or are unjust: *Khela v. Phoenix Homes Limited*, 2015 BCCA 202 at paras. 37-38; *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193 at paras. 63-64; *Radford v. MacMillan*, 2018 BCCA 335 at para. 54; and *Wilson v. Alharayeri*, 2017 SCC 39 at para. 59.

[Emphasis added.]

More particularly, an order made for the valuation of shares of a dissenting shareholder under the Business Corporations Act is a matter of discretionary judgment that will not be interfered with unless the judge erred in law or principle or was clearly and palpably wrong with respect to a matter of fact: *Bamrah v. Waterton*, 2020 BCCA 122, at para. 58. While the Order was not made under the same provision of the Act, the applicable standard of review is the same.

- [31] The determination of what constitutes a just and equitable remedy is also a question of mixed fact and law, and the court will only interfere if the judge "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": *Esposito v. Esposito*, 2022 BCCA 51 at para. 17.
- [32] In short, the standard of review applicable to the Order under appeal is highly deferential. To intervene, this Court would have to find that the judge erred in law or principle, was clearly and palpably wrong with respect to a matter of fact, or that the Order is so clearly wrong as to result in an injustice.

Have the appellants identified an extricable question of law on which the judge erred?

- [33] The appellants argue that the judge ruled on a matter that was not before her when she considered the "slippery slope" that would be created if both parties were permitted "to raise issues they say will change the ultimate valuation in their favour": at para. 41. The appellants say that although they took the position that the judge should direct the parties to instruct the valuator to correct inadequacies they had identified beyond the initial error the valuator identified in his December 12, 2019 email, the respondent did not seek a direction for the valuator to consider other issues or inadequacies. Rather, the respondent took the position that the only direction required was to instruct the valuator to make changes necessary to correct the identified error. In essence, the appellants argue that because of the position taken by the respondent on the application for directions, the judge exceeded her jurisdiction by "going beyond the relief that was claimed."
- [34] I am of the view that there is no merit to this ground of appeal. In support of this argument, the appellants refer to *Borsato v. Basra*, 2000 BCSC 1898. As I will explain, that decision provides no assistance to the appellants' position.
- [35] In *Borsato*, the judge allowed an appeal from a Master's order striking a statement of defence and requiring the defendants to file and deliver an amended statement of defence. The application to strike had been based on the failure of the defendants to deliver a list of documents and respond to a demand for particulars. By the time the application was heard the defendants had delivered their list of documents and they took the position that the demand for particulars was not proper. At the hearing of the application, the applicant argued that the statement of defence should be struck because of inadequacies in the pleading, relying on Rule 19 of the Supreme Court Civil Rules. That position had not been raised and the rule had not been referred to in the notice of motion.
- [36] The Master agreed with the defendants that the demand for particulars was not proper, but nevertheless struck the statement of defence under Rule 19 because of the alleged inadequacy of the pleadings. On appeal, the judge described the issue before him as follows: "if a notice of motion applies for relief, relying on one rule, whether the Master can grant that relief, based on other rules of which the defendant has not been given notice." He found that the test to be applied was whether the notice of motion gave the opposing party "reasonable notice of the application against them, and what is being sought": at para. 5. The judge concluded:
- [8] So, in essence, I find that the defendants did not have notice of the application, or did not have notice of the relief which was ultimately granted by the Master, and that the Master did exceed his jurisdiction in going beyond the relief claimed, or "dispos(ing) of any question arising on the application" as set out in Rule 52(11)(a).
- [37] The circumstances of the application before the judge bear no similarity to those in *Borsato*. The parties had been before the judge on several occasions in an effort to finalize the valuation of Radio City. The two applications before the judge sought directions, in

accordance with the judge's earlier direction, on what joint instructions should be given to the valuator in order to achieve that goal. The positions of both parties were fully briefed in their notices of application and fully argued by counsel. Unlike the defendants in *Borsato*, the appellants were given full notice of the application and the relief sought. They were not caught by surprise and had a full opportunity to respond to the respondent's arguments. The judge made the Order in the terms sought by the respondent. In doing so, she relied on the arguments advanced by the respondent, including that there were other issues with the valuation beside those raised by the appellants, that should be examined by the valuator if he was to be asked to reconsider the draft report.

[38] The respondent's notice of application set out the history of the dispute, including the steps taken since the 2018 Order. They noted the numerous applications brought to attempt to finalize the valuation. That order anticipated that the exercise of the Option would take place within 90 days of the appointment of the valuator. More than two years had passed since the order was made. The respondent submitted:

31. As of October 30, 2020, it will have been approximately 29 months since the Valuation was ordered by the Court, 25 months since the Valuator was jointly instructed, and 12 months since the Valuator provided his Draft Report. During this time, the Respondents have demonstrated a clear pattern of delay.

The respondent also described the prejudice allegedly suffered by the Estate and its beneficiaries as a result of the delay.

[39] The appellants' contention that the judge erred by ruling on a matter that was never before her is entirely lacking in substance. The respondent directly raised issues with the draft report which, if considered, could have led to an increase in the valuation of Radio City. The matters set out at paras. 35 to 38 of the Reasons, which form the basis for the appellants' argument on this ground of appeal, were described at para. 33 of the respondent's notice of application and referred to by counsel in oral submissions before the judge. However, the respondent took the position as set out at para. 34 of their notice of application:

34. Notwithstanding the issues with the Draft Report identified above, the Petitioner is willing to accept the Draft Report, with the [identified error] corrected at the discretion of the Valuator, and applies to have the valuation finalized on those terms so that the parties are able to proceed as soon as possible, as set out in the [2018 Order].

[40] The respondent further submitted at the hearing of the application below:

but in the event that the court does direct any sort of further direction to the valuator, in terms of further amendments, the valuator would then obviously have to consider the various comments that - - that our experts, Mr. McEwen and Mr. Wilson, have otherwise identified, which would in turn raise the value

[41] In short, there is no substance to the argument that the judge exceeded her jurisdiction by considering the respondent's arguments on this issue. Further, had the judge decided to make an order respecting other directions to be given to the valuator (aside from correction of the identified error), it was open to her to expand beyond those sought by the appellants. Rule 22-1(7)(a) permits a judge in chambers to "grant or refuse the relief claimed in whole or in part, or dispose of any question arising on the chambers proceeding". In the circumstances of this case, where the potential issues with the draft report had been so fully debated and briefed, the judge could have directed the parties to instruct the valuator to amend the report to consider none, some, or all of the issues highlighted by the parties.

[42] The appellants have not identified an extricable question of law on which the judge erred and I would not give effect to this ground of appeal.

Did the judge err in fact and law, or in the exercise of her discretion, in determining that it was just and equitable to order the parties to instruct the valuator to finalize his report without further amendment?

[43] The appellants argue that the judge exercised her discretion erroneously as the direction for finalizing the valuator's report was neither just nor equitable to the interests of the appellants. They say the Order effectively requires the appellants to pay the entire tax liability of the respondent which would be unfair to them. Further, they say that the judge should have directed the valuator to correct errors and resolve inconsistencies that impacted the determination of the range of fair market value of Radio City. They argue that the process to finalize the valuation report appears to have been driven by expediency rather than by any concern for its accuracy.

[44] In making this argument in the court below, the appellants raised a number of alleged errors in the draft valuation report. They now restrict their submissions to two alleged errors: the failure of the valuator to provide an appropriate discount to the share valuation to reflect the latent tax liability on the disposition of the assets of the company; and the failure to reflect a realistic split between the land and building value for the Burnaby Property.

[45] With regard to the first alleged error, the appellants note that the selection of any value within the range of fair market values provided by the valuator reflects an assessment of the future tax liabilities of the company. The treatment of the tax liabilities and tax shield depends on the length of time the company would be expected to hold the two properties before selling them. According to the valuator, the low range of the fair market value reflects a transaction in which the acquired properties are immediately sold, whereas the high range reflects a transaction in which the properties are held indefinitely. The appellants argue that the valuator failed to factor in an "illiquidity discount" to the high-end value. They say that this results in a valuation that effectively requires the appellants to take on 100% of the tax liability on purchasing the remaining share in the company.

- [46] With regard to the second alleged error, the appellants argue that the valuator based his opinion on an incorrect fact: that the value of the Burnaby Property was almost entirely in the land value for redevelopment. This is reflected in the allocation of value between the land and the building which assumes more than 99% of the property value is in the land. The appellants argue that this is clearly wrong as it is inconsistent with the Burgess Cawley appraisal of the Burnaby Property in which Ms. Lochhead opined that "the current use as a rental apartment building will deliver the greatest net return to the property." Instead of obtaining the appraiser's opinion on the land/building allocation, the valuator relied on the values in the municipal tax assessment, which assigned virtually no value to the building. They submit that this amounts to clear error by the valuator that obviously affected his opinion of value of the Burnaby Property and of Radio City.
- [47] The respondent, referring to the valuator's correspondence with the parties and the McEwen report, submits that the valuator did not err in regards to the latent tax liabilities of the company and that the valuator's approach to determining the low and high end of the range of fair market values of the company was reasonable. Further, the respondent emphasizes that in making the Order the judge exercised her discretion to fashion a remedy that was just and equitable to resolve the deadlock between the shareholders. It argues that the appellants can point to no error in principle and says that it was well within the judge's discretion to accept the valuation put forward by the valuator chosen by the parties.
- [48] In response to the second alleged error the respondent notes that the valuator was aware that he was using the municipal tax assessment values rather than an opinion of the appraiser for the purposes of the allocation of value between land and building. He did so as the appraiser did not provide such an allocation. The respondent submits that this was a discretionary choice that he could make in exercising his professional judgment to arrive at the valuation.
- [49] Further, the respondent says the judge appropriately considered the other matters raised in argument in the court below when she ordered the parties to instruct the valuator to finalize the report correcting only the agreed error. These included the other potential issues with the draft valuation that could have increased the range of values as well as the evidence of prejudice to the Estate that was occurring because of the delay in resolving the dispute.
- [50] It is my view that the appellants can identify no error in principle and no failure in the application of relevant factors in making the Order without a direction that the valuator address the additional concerns raised by the appellants. As noted above, the judge acknowledged at the outset that "[t]he methodology to be used for the valuation of the properties rests squarely within the specialized expertise of a qualified business valuator and outside of the Court's knowledge and expertise": at para. 25. The judge was aware of the appellants' position in regard to the two alleged errors and knew that the valuator had been fully informed of the positions of both parties and had provided his views on the concerns raised. With that knowledge and understanding of the issues, the judge concluded that she should not direct the valuator to further consider those issues.

- [51] Before addressing the appellants' arguments in more detail, it is worth noting that they are based on the premise that the valuation contains "errors". Further, the arguments attempt to characterize the judge's resolution of the two issues raised as an error of mixed fact and law attracting appellate intervention. The arguments reflect a misunderstanding of the nature of the valuator's role in providing an opinion of value and of the judge's role in making the Order.
- [52] The appellants' arguments suggest that there must be one correct answer to the valuation question. But the valuator was selected by the parties for his professional expertise to provide an opinion of value of the Estate's share. The judge's role was a limited one. She was not tasked with making findings of fact. She was to consider the submissions of the parties and determine the instructions to be provided to the valuator. In doing so, she had to decide whether it was necessary to direct the valuator to reconsider his opinion in order to arrive at a just and equitable remedy to resolve the deadlock.
- [53] As with any other expert opinion, the valuator's report was based on underlying assumptions. The appellants tried to challenge those assumptions, but after receiving a considerable amount of evidence, including conflicting expert opinion, the judge concluded that the valuation was not unreasonable and that it could form the basis for the resolution of the dispute either through the appellants' exercise of the Option or through winding up of the company. She concluded that it would be just and equitable to resolve the dispute by accepting the opinion of the valuator who had been jointly appointed by the parties. In doing so, she was exercising her discretion as she was called on to do by the parties.
- [54] Regarding the first alleged error, and in response to the appellants' inquiry as to why the valuator did not value the corporation on a liquidation basis, the valuator explained his approach in his March 13, 2020 letter:

In addition to the above, you note that "if Boxer Holdings does not agree to purchase the Melcer shares, then the company would be wound up on the basis of the realization of the underlying assets, with the shareholders having the burden of the taxes payable." I think you are implying the Boxer Parties would not pay more than liquidation value for the shares of the Melcer Parties because they will be able to purchase the stake for this amount when it is wound up or alternatively that this is the most the Melcer Parties could expect to receive for their shares on liquidation.

But performing a liquidation approach provides the Boxer Parties with a windfall gain. If the Company is wound up, all parties will be forced to bear 100% of any latent taxes and disposition costs. If it is valued on a liquidation basis, then the Boxer Parties will acquire the Melcer Interest on the assumption that 100% of any latent taxes and disposition costs have been incurred, which will greatly reduce the fair market value of the Company and ensure the Melcer Party effectively pays those taxes and fees. But in purchasing the Melcer Interest the Boxer Parties will not be forced to incur those taxes and fees but can defer them indefinitely.

Accordingly, as with the minority discount, if I am asked to provide a liquidation value for the Company, I can of course do that. But it is not clear that this is what I have been requested to do and therefore I will need to be specifically instructed to do so.

- [55] It is evident that the valuator was alive to the issues the appellants raised about the future tax liabilities and the fact that a liquidation approach would produce a value at the low end of the range. He reminds the appellants that he was instructed to provide a range of values that would reflect different assumptions about timing of the disposition of the assets and the resulting tax liabilities flowing therefrom. He notes that a liquidation approach to the valuation would be inappropriate as it would provide the appellants with a windfall gain. This is consistent with the opinion provided by Mr. McEwen as to the role of the valuator given the terms of the 2018 Order. He noted that the order prescribed an action - winding up or liquidation - that must be taken if the Option was not exercised, and opined that this was not "an instruction to the valuator as to the only factual scenario that must be assumed in forming the valuation opinion." Mr. McEwen further indicated that it is possible for a valuator to "present valuation conclusions in a range, depending on the assumed date of sale of the assets by the corporation."
- [56] There is no question that the 2018 Order required the valuator to express a range of values taking into account tax consequences, and that it contemplated the low end of the range to represent the value of the company based on a liquidation or winding up. The 2018 Order also permitted the appellants to purchase the shares at the high end of the range of values, reflecting the assumption that if they wished to acquire and hold on to all of the shares of Radio City, the purchase price should reflect the ability to defer the tax consequences indefinitely or for a very long time. I fail to see any error in principle in the judge's approach to consideration of the valuation, or how the Order can be said to be unjust in any way.
- [57] The appellants disputed the valuator's approach to the question of the tax consequences of the purchase, pointing to the letter of Mr. Spence, the independent valuator whom they retained. (I should note, without drawing any conclusions about the weight that the judge could give to either opinion, that Mr. Spence's report did not meet the requirements of the Supreme Court Rules for an expert opinion, while Mr. McEwen's report did.) Mr. Spence criticized the failure of the valuator to apply an illiquidity discount when considering the tax shield at the high end of the valuation. However, Mr. McEwen noted that the amount of the latent tax liability or latent tax recoverable is a matter of a valuator's professional judgment. He further explained that a valuator must apply a tax shield formula based on a discount rate and that the discount rate used "is a matter of professional judgment for the valuator based on education, training and experience." He also observed that the discount rate that the valuator applied was not unreasonable.

- [58] The judge was aware of Mr. Spence's criticism and noted that the valuator had not commented on the issue of the illiquidity discount raised by Mr. Spence. However, she also noted that the valuator had not been given an opportunity to do so. She assumed that he may have had an explanation for his approach, but in any event, she would have been aware of the comments provided by Mr. McEwen.
- [59] In summary on the first issue raised by the appellants, they are unable to point to any error or mistake in the valuation. The alleged errors are matters on which the valuator exercised his professional judgment and which other valuers may have approached differently. The judge was entitled to accept the valuation as presented.
- [60] As for the second error, the valuator explained in the draft report that he had replaced the carrying value of the land and buildings with the market value as determined by the appraiser and then allocated that between land and building based on the relative values as set out in the 2019 assessments for both properties. When asked about this in November 2019, the valuator provided a fuller explanation:

In respect of [counsel's] question: Burgess Cawley has not provided a split between land and building. Instead, I have allocated the overall market value as determined by Burgess Cawley between land and building based on their relative values as per the property tax assessments in the Burgess Cawley Report. In the case of [the Burnaby Property], given the age and condition of the building, most of the value has been attributed to the land; whereas there is still significant value being attributed to the building in the case of Canaland.

- [61] When the respondent suggested in counsel's letter of February 21, 2020 that the valuator should obtain a more accurate allocation of value as between building and land, the valuator indicated that this could be done but suggested that there would still remain significant uncertainties given the circumstances relevant to the Burnaby Property:

You ask whether it is possible to obtain a more accurate split of market value between land and building than that which I have used, which allocates value based on the land/building split in the tax assessments for the properties.

I have spoken to Ms. Lohead of Burgess Cawley about the feasibility of providing the land/building split for the two buildings. I gather this is relatively straightforward for the Canaland property, but not the Radio City property, which is of greater concern to you. It appears the issue is that there is significant uncertainty about what could be developed on the site, and this impacts how much value may be attributed to land the versus building. My understanding is that the City of Vancouver assumes in its tax assessment that the property will be developed. But if this is not the case, and the only feasible path is to continue to rent out the property as is or after renovation, the existing improvements may have some value. The issue is complex and I have asked Lohead to provide a description of it in her own words (see Appendix) as well as a fee quote (\$3,500-\$4,000) and timeline to perform this additional work (typically 4 to 5 weeks out from receiving instructions, I understand). I gather that at best we will likely receive a range of values for the land/building split for Radio City.

- [62] The appellants argue that this comment shows that the apportionment of value as between building and land for the Burnaby Property that the valuator used for arriving at the valuation was clearly incorrect. Further, it shows that it would have taken only a small amount of additional time and money to correct the error. As I have noted above, the appellants also say that the use of the allocation was inconsistent with the appraiser's conclusion that use of the property as a rental apartment would deliver the greatest net return. The appellants complete this submission by saying that the judge thus committed a palpable and overriding error by accepting the valuator's approach and in not directing the parties to instruct the valuator to correct this error.
- [63] I am of the view that this argument also mischaracterizes both the opinion of the valuator and the basis for the judge's decision.
- [64] Although the valuator acknowledged that he could obtain more detailed information about the value of the Burnaby Property, he did not agree that he required additional information regarding the allocation of value between land and building, or that if he had such information it would change his valuation. He certainly did not agree that he had made an error in using the assessment allocation. Indeed, he concluded that "at best" he would receive a range of values for a building that he had considered to be of little value given its age and condition. This is another matter on which the valuator exercised his professional judgment in performing the valuation.
- [65] The judge recognized that if the question of the land/building allocation for the Burnaby Property was reconsidered, it might result in a reduction in the valuation at the upper end of the range. However, she was also aware of the issues raised by the respondent that might, if reconsidered, increase the valuation. The judge concluded that if she permitted the appellants to instruct the valuator to respond to the concerns about the land/building allocation she should also, in the interests of fairness, permit the respondents to seek a response to the concerns that they had identified in the valuator's draft report. In doing so, she properly took into account the additional time that would have been required to seek refinement of the valuation. Contrary to the appellants' assertion, this was not an unreasonable acceptance of expedience at the expense of accuracy. Rather, the judge exercised her discretion after considering the competing opinions, the circumstances surrounding the deadlock and the arguments of the parties.
- [66] Ultimately the judge considered the issues raised by the appellants and concluded that it would be just and equitable to order the parties to instruct the valuator to finalize his report and to bring the longstanding dispute between the parties to a resolution. The determination of a "just and equitable" solution is highly discretionary: the words "just and equitable" are "of the widest significance and confer a broad discretion on the court": *Esposito* at para. 19. In the context of resolving corporate deadlock the judge must strike a fair balance between the relevant considerations, but judges may reasonably differ as to what such a fair balance would be: *Whistler Service Park Ltd. v. Glacier Creek Development Corp.*, 2005 BCCA 472 at para. 20. These decisions are afforded considerable deference on

appeal: M. McIsaac Family Holdings Ltd. v. Tolam Holdings Ltd., 2020 BCCA 371 at para. 60.

- [67] The Order reflects a highly discretionary decision that the judge had to make in particular and unusual circumstances. The judge considered the history of the dispute and the particular factors relevant to valuation of the two properties and the shares. She concluded that the appellant had failed to point to any issues that required reconsideration and she accepted the valuation as presented. In doing so, she considered the valuator's responses to the appellants' comments, the opinions provided by Mr. Spence and Mr. McEwen, and the arguments of the parties. She concluded that she should not second guess the valuator's methodology which was clearly a matter of professional judgment and expertise.
- [68] As the respondent argues, many of the basic principles informing the deferential standard of review are relevant here: limiting the number, length and cost of appeals; promoting the autonomy and integrity of trial proceedings; and recognizing the expertise of the trial judge and their advantageous position: Housen at paras. 15 - 18. The parties' attempts to resolve this matter have spanned years and the judge was involved in the litigation to achieve that resolution for an extended period. She heard the parties on four separate occasions. She was well placed to weigh and consider the factors that went into her discretionary orders. In particular, it was open to her to place weight on the interest of concluding the valuation process when faced with contentious and uncertain claims about inaccuracy and the risk of prejudice to the respondent arising from the continuing delay. The appellant has failed to direct this Court to any error in principle let alone any palpable and overriding error in her findings. Neither can they point to any injustice in the result.

## Disposition

[69] I would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I agree:

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Griffin"

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