

CANADA / JUDGMENT

Petersen v. Hawley

2021 BCSC 2348

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2021 BCSC 2348 Petersen v. Hawley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Petersen v. Hawley,

2021 BCSC 2348

Date: 20211201

Docket: S209465

Registry: Vancouver

Between:

Kelly Petersen

Petitioner

And

Kerry Hawley and Value Equity Ltd.

Respondents

Corrected Judgment: The text of the judgment was corrected on the front page and at paragraphs 33, 72 and 73 on December 9,, 2021.

Before: The Honourable Mr. Justice Branch

Reasons for Judgment

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Place and Date of Trial:

Abbotsford, B.C.

September 20-22, 2021

Place and Date of Judgment:

Vancouver, B.C.

December 1, 2021

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I. INTRODUCTION

- [1] This petition seeks the Court's assistance in resolving an internecine struggle between twin brothers for control of part of their business empire.

II. BACKGROUND

- [2] Value Equity Ltd. ("Value") was incorporated pursuant to the laws of British Columbia in 1996. Mr. Hawley is the President of Value, and his brother Mr. Petersen is its Vice President and Secretary. Mr. Petersen and Mr. Hawley each own 50% of Value's shares, and both are directors.
- [3] Mr. Petersen and Mr. Hawley have jointly owned and operated a group of family companies for some 30 years (the "Mega Group"). The Mega Group includes Value, Mega Cranes Ltd. ("Mega Cranes"), Vital Holdings Ltd. ("Vital"), MBS Structural Engineering Ltd., Mega Truck and Transportation Ltd., Mega Lift Ltd., Mega Building Systems Inc., and Mega Structures Ltd.
- [4] Mega Cranes is the core operating company. It is in the business of providing crane services and equipment for construction projects.
- [5] For many years, Mr. Petersen and Mr. Hawley worked cooperatively to manage the Mega Group. Mr. Hawley's responsibilities were primarily operations and sales. Mr. Petersen's contributions were largely administrative, including staffing, banking, and the collection of accounts.
- [6] The management of the Mega Group was quite informal. There was no shareholder agreement between Mr. Petersen and Mr. Hawley. There is no evidence of Value having regular directors' or shareholders' meetings.
- [7] Value, the Mega Group corporation at issue in these proceedings, was originally incorporated to purchase a piece of property at 6330 - 148th Street in Surrey, British Columbia. (the "Surrey Depot"). The Surrey Depot was used as the base of operations for Mega Cranes. Both Value and Mega Cranes treat the Surrey Depot as their administrative office.
- [8] Value's operations eventually expanded beyond its ownership of the Surrey Depot. Value is now the registered holder of the following properties:
- a) the Surrey Depot;
 - b) a depot in Red Deer, Alberta (the "Red Deer Depot"), also occupied by Mega Cranes;
 - c) 3916 - 56 Avenue S.E., in Calgary, Alberta (the "Calgary Property"), which is leased by an unrelated third party, the Calgary Foothills Soccer Club; and

- d) parcels of land at 15557- 36 Avenue in Surrey, British Columbia, and 15587 - 35 Avenue in Surrey, British Columbia ("the "Surrey Properties"), which are rented to third parties; (collectively, the "Value Properties").
- [9] Value's income is largely derived from rent from the Value Properties.
- [10] The Value Properties were appraised by Suncorp Valuations in mid-2020 at approximately \$29,093,000. In August 2021, Suncorp Valuations provided an updated appraisal of the Surrey Depot that brings the total valuation closer to \$35 million. The Value Properties are subject to financing obligations, which are presently around \$11.3 million.
- [11] There is no written lease governing Mega Cranes' occupation of the Surrey Depot or the Red Deer Depot. There is little evidence that Mega Cranes ever paid rent directly to Value. Rather, Mega Cranes says that it effectively paid its rent by contributing towards Value's expenses and financing obligations.
- [12] Mr. Hawley says that Mega Cranes also paid a substantial amount towards the original acquisition of the Value Properties. Mr. Hawley alleges that the net amount contributed by Mega Cranes (for which it has not yet been compensated from the proceeds of earlier sales of property) is approximately \$1.8 million.
- [13] Mr. Hawley alleges that Mega Cranes:
- a) made the property tax and utility payments associated with the Value Properties;
 - b) paid the costs associated with the construction of an approximately 6,000 square foot shop and approximately 2,500 square feet of office space at the Surrey Depot, the total cost of which was approximately \$800,000;
 - c) paid the costs for backfilling, landscaping and fencing at the Red Deer Depot; and
 - d) paid costs associated with efforts to develop the Surrey Properties.
- [14] The tension between the brothers appears to have as its genesis Mr. Hawley's 2018 decision to employ his daughter to work in an area that Mr. Petersen considered his domain. In August 2019, their relationship deteriorated further when Mr. Petersen publicly announced his decision to retire. Mr. Hawley says he was not consulted or informed about this decision beforehand. Mr. Petersen says that there was an understanding that each could retire and be paid fairly for his interest. Mr. Hawley denies there was any such agreement.
- [15] After his retirement announcement, Mr. Petersen proposed that the Mega Group companies be sold, with that the profits from the sales being shared equally. In the alternative, Mr. Petersen proposed that Mr. Hawley buy him out. Mr. Hawley was not interested in either of these proposals.

- [16] Mr. Hawley alleges that Mr. Petersen then unilaterally listed the Surrey Depot for sale without his consent. Mr. Petersen received an offer for the Surrey Depot in 2020, but Mr. Petersen and Mr. Hawley were not able to agree on the proposal. Eventually the listing was taken down, but tensions mounted.
- [17] At the onset of the COVID-19 pandemic, Mr. Petersen negotiated a rent abatement for the Calgary Property for the period April to July 2020. Mr. Petersen was traditionally the principal point of contact with the Calgary Foothills Soccer Club. However, Mr. Hawley was upset that Mr. Petersen did not inform Mr. Hawley of this decision to grant an abatement.
- [18] Mr. Hawley locked Mr. Petersen out of computer servers used for both Value and Mega Cranes' accounting and operations. He prevented Mr. Petersen from entering the Surrey Depot. Mr. Hawley terminated Mr. Petersen as an employee. Mr. Petersen no longer receives any health and medical benefits, and no longer receives a salary or draws. By resolutions dated May 1, 2020, and June 22, 2020, Mr. Hawley, on behalf of Vital and Mega Cranes, purported to unilaterally remove Mr. Petersen as a Director, Vice-President, and Secretary of Mega Cranes.
- [19] By midsummer 2020, the relationship between Mr. Petersen and Mr. Hawley had completely fallen apart. The conflict between the brothers reached a peak on June 22, 2020, when the two had a physical altercation that required the involvement of the RCMP. Each brother accuses the other of starting the fight.
- [20] The question of the ownership of Mega Cranes was an additional point of friction. Mr. Petersen alleges that when Mega Cranes was incorporated, the brothers agreed to split the entire Mega Group equally, including Mega Cranes. However, 100% of the shares in Mega Cranes are held by Vital, and Mr. Hawley is the sole director of this company. Mr. Hawley's position is that, as a result of a series of historical transactions, Mr. Petersen only controls 10% of Mega Crane. Mr. Petersen takes the position that he still controls 50%. Mr. Hawley's position appears to be somewhat strengthened by the fact that Mr. Petersen made certain declarations in his divorce proceedings that suggested that he controlled less than 50%.
- [21] One can see how any dispute over the ownership of Mega Cranes in turn demands formality in relation to the accounting and contractual relationship between Mega Cranes and Value. If the brothers did not own all of the companies equally, then every dollar or credit flowing between Mega and Value should have been carefully accounted for, as the brothers would have an unequal interest in every such dollar.
- [22] Unfortunately, the required level of formality does not appear to have been the practice. The accounting appears to have been informal or inconsistent. For example, Mega Cranes' financial statements are difficult to square with the amount alleged by Mr. Hawley to be owed by Value to Mega Cranes. Mega Cranes' March 31, 2019 financial statements only assert that there was \$831,333 owing to it from related parties, rather than the \$1.8 million alleged by Mr. Hawley.

- [23] The rental arrangements between the companies are also unclear. Mr. Petersen alleges that there was never any agreement that Mega Cranes did not have to pay rent directly to Value, and could simply apply offsets. He takes the position that Mega Cranes has not been paying market rent, and should, at a minimum, now start to do so. A \$30,000 monthly rate for the Surrey Depot and \$4,000 for the Red Deer depot was apparently established in April 2019 through discussions between Mr. Petersen and Bob Smarz, Mega Cranes' accountant. The rates have not been adjusted since. Mr. Petersen suggests that Value should be charging a rate well above current rates. On February 1, 2021, Cushman & Wakefield opined that the market rate for the Surrey Depot would be about \$58,000 per month. The same report also estimated the fair market rental rate of the Red Deer Depot would be about \$8,250 per month.
- [24] There is also a dispute about the ownership of the Surrey Properties. Mr. Petersen demanded that one of the Surrey Properties be transferred to him on the grounds that he is its true beneficial owner. Mr. Petersen relies on a declaration of trust, but Mr. Hawley says Mr. Petersen proposed this declaration simply as a means of reducing their overall tax burden. Again, if the ownership of the Surrey Properties is not equal, there becomes a need for precise accounting given the different legal interest in the various properties.
- [25] The difficulties between the brothers began to seep into their relationships with third parties. Mr. Hawley started to insert himself into the relationship with the Calgary Foothills Soccer Club. Mr. Hawley's intervention was followed by correspondence from the Calgary Foothills Soccer Club expressing frustration that it was effectively being caught in the middle between feuding brothers.
- [26] The brothers also started to argue about control of Value's bank accounts and funds. Mr. Petersen had applied on Value's behalf for the subsidies available from the federal and provincial governments in response to the COVID-19 pandemic. Mr. Hawley says that Mr. Petersen failed to deposit any subsidies received into Value's bank accounts. He also alleges that Mr. Petersen has not been depositing other rent payments. Mr. Hawley has taken to removing funds from Value's primary account upon deposit. He says this is necessary because he cannot trust Mr. Petersen not to divert funds left in this account. Mr. Hawley alleges that Mr. Petersen previously undertook transactions that removed funds from Value's bank account without approval, including the transfer of nearly \$50,000 to another company controlled by Mr. Petersen. For his part, Mr. Petersen raises a series of concerns about Mr. Hawley's own expenditure of corporate funds--conduct which Mr. Hawley vehemently denies.

- [27] Even the routine task of preparing Value's tax returns has become an issue. Mr. Hawley complains that Mr. Petersen, despite specific instructions from Value's accountants not to do so, filed tax return for Value without Mr. Hawley's approval. Mr. Hawley says these tax returns subsequently needed to be revised to correct material errors. Mr. Hawley appointed new accountants to do this work without Mr. Petersen's approval, and without the benefit of a resolution under s. 209 of the Business Corporations Act, S.B.C. 2002, c. 57 ("BCA").
- [28] There are other legal proceedings ongoing between the brothers, including actions that seek to address the proper control and operation of Mega Cranes. Mega Cranes is separately represented and did not appear at this hearing.
- [29] There is little dispute that neither party has the funds necessary to buy out the other's interest in the Mega Group at this time. So, what, if anything, can be done to help resolve the brothers' conflict?

III. ISSUES

- [30] In his petition, Mr. Petersen initially sought a declaration that Value was being run in an oppressive manner, contrary to s. 227 of the BCA. However, by the time of the hearing, Mr. Petersen indicated that he was only seeking an order to have Value liquidated, pursuant to s. 324 of the BCA. He proposed to adjourn the balance of his petition.
- [31] In response, Mr. Hawley applied for an order that the petition be converted to an action and put on the trial list.

IV. ANALYSIS

A. Adjournment

- [32] At the outset of the hearing, Mr. Hawley raised a concern about Mr. Petersen's proposal to adjourn the balance of the relief sought in his petition. Mr. Hawley argued that any remaining remedies should be abandoned, or there should have been an application for severance.
- [33] I found that Mr. Petersen's proposal was an appropriate manner in which to proceed. The liquidation test has a lower threshold than that required to obtain an oppression remedy: *J & A Properties Ltd. v. De Angelis*, 2020 BCSC 1254 at para. 56; *Callahan v. Callahan*, 2011 BCSC 40 at para. 46. Further, Mr. Petersen made a formal commitment that, if his request for a liquidation were granted, his request for an oppression remedy would be abandoned.
- [34] I confirmed to the parties that in order to minimize any inefficiency created by this process, I would seize myself of any residual relief pursued under the petition.

B. Liquidation

1. The Legal Framework

[35] Section 324 of the BCA provides the court with the power to order a liquidation. It states in relevant part:

Court may order company be liquidated and dissolved

324(1) On an application made in respect of a company [by] a shareholder of the company the court may order that the company be liquidated and dissolved if

- (b) the court otherwise considers it just and equitable to do so.
- (3) If the court considers that an applicant for an order referred to in subsection (1) (b) is a person who is entitled to relief either by liquidating and dissolving the company or under section 227, the court may do one of the following:
 - (a) make an order that the company be liquidated and dissolved;
 - (b) make any order under section 227 (3) it considers appropriate

[Emphasis added.]

[36] The words "just and equitable" in s. 324 "are of the widest significance and confer a broad discretion on the court": *Boffo Family Holdings Ltd. v. Garden Construction Ltd.*, 2011 BCSC 1246 at para. 151; *Hui v. Hoa*, 2015 BCCA 128 at para. 61; *Esposito v. 304768 B.C. Ltd.*, 2021 BCSC 961 at para. 9.

[37] The existence of deadlock within the operations of a corporation is highly relevant to the consideration of whether a winding-up order should issue: *Callahan* at para. 48. In *Cariboo Western Lumber Ltd. v. Mochizuki et al*, 2000 BCSC 1537, the court stated:

[45] In *S.G. & S. Investments (1972) Ltd. v. Golden Boy Foods, Inc.* (1991), 56 B.C.L.R. (2d) 273 (B.C.C.A.) Southin J.A. stated at 280:

Although s. 296 [now s. 272] is capable of more than one construction, it entitles the court, in my opinion, where there is good ground for a winding-up order -- and deadlock is the classic ground -- to determine not to make a winding-up order but instead to make an order under s. 224 [now s. 200].

If oppression has been established, then ordinarily it would not be right to make an order sought by the respondent to which the oppressed petitioner objects. It is not, generally a proper exercise of discretion for the court to reward the wrongdoer.

But where, as here, what has been established is a deadlock, the court may properly order the purchase by any shareholder of the shares of any other. Deadlock is not of itself oppression and does not necessarily connote wrongdoing by either party.

[46] I conclude that there has been no wrongdoing such as to invoke the oppression and unfair prejudice provisions of s. 200 (1) of the Act, but that the brothers are deadlocked and it is just and equitable to make the order sought by K. Mochizuki, directing that he purchase G. Mochizuki's shares at a fair market value, taking into account G. Mochizuki's shareholder advances.

[Emphasis added.]

[38] In *Callahan v. Shasta Properties Ltd.*, 2015 BCSC 663 ("Shasta"), the court elaborated on the test:

[81] Considering the various authorities cited by the parties, I am satisfied that the role of the court when determining whether it is just and equitable to order the winding up of a company is to focus on the reasonable expectations of the parties, and that it is not a condition precedent to the granting of relief that the conduct of the company's affairs is being impeded. As noted by Lord Wilberforce in *Ebrahimi*, the just and equitable test is a flexible one and it would be dangerous to prescribe or limit the circumstances in which it will apply, for example by requiring that an applicant establish that the disharmony or dysfunction between shareholders is prejudicing the proper functioning of the company. That will be a significant factor for the court to consider but it is not determinative...

[Emphasis added.]

[39] The situation of a family company, where shareholders have more than a mere commercial relationship, has been recognized as a special case. In *Safarik v. Ocean Fisheries Ltd.* (1996), 12 B.C.L.R. (3d) 342 (C.A.), Madam Justice Southin said that "[f]amily companies are very different from non-family companies" and that "it is not erroneous to take a more liberal approach to the words 'just and equitable' in the case of a family company": paras. 100 and 102. Similarly, in *Callahan* at para. 53, the court stated that "[i]t is appropriate to take a liberal approach to the words 'just and equitable' in the case of a family company in which one family member is no longer allowed to participate in the business". See also: *Ten Hoeve v. Beukens*, 2020 BCSC 1194 at para. 47; *Shasta* at para. 70.

[40] Where the relationship between the parties resembles a partnership more than arm's length shareholders, such that it can be said that the entity is, in substance, a partnership in the guise of a private company, courts have been prepared in certain circumstances to liquidate on the same grounds that would justify the winding-up of a partnership: *Vivian v. Firth*, 2012 BCSC 517 at paras. 72 and 74. If a partnership analogy is found to be apt, it is still necessary to identify the circumstances that would justify intervention on equitable grounds and a winding-up order. Those circumstances encompass:

- a) a breakdown of the mutual trust and confidence upon which the original undertaking was founded;

- b) a destruction of the mutual confidence between the members or a breach of the original agreement, and of the good faith which underlay it;
- c) a justifiable lack of confidence in the conduct of the company's affairs by the directors, where that lack of confidence grounded in a lack of probity, good faith, or other improper conduct, on the part of a majority of directors;
- d) a refusal to meet on matters of business, continued quarreling, and such a state of animosity that all reasonable hopes of reconciliation and friendly cooperation are precluded; and
- e) a situation where it is impossible for the partners to maintain the reasonably expected confidence in each other necessary to continue the affairs of the business, and such impossibility has not been caused by the person seeking to take advantage of it.

See Vivian at paras. 72 and 77-78.

[41] In *Animal House Investments Inc. v. Lisgar Development Ltd.* (2008), 87 O.R. (3d) 529 (Ont. Sup. Ct. J.), aff'd (2008), 237 O.A.C. 261 (Ont. Div. Ct.) ("*Animal House*"), the court confirmed that irreconcilable differences alone are not sufficient to justify a winding-up order:

[57] All of the cases cited to the Court reflect the underlying and unifying principle that a court will only exercise its discretion to order a "just and equitable" winding-up if the disharmony has resulted in a sufficiently serious failure of the reasonable expectations of the parties to warrant such equitable relief. In order to satisfy this test of a serious failure of expectations, an applicant must demonstrate that the parties regarded, or would have regarded if they had turned their minds to it at the time of formation of the business association, the particular circumstances resulting from the disharmony to constitute the termination or repudiation of the business relationship among them. Accordingly, incompatibility is significant only insofar as it has resulted in a state of affairs in which the reasonable expectations of the parties are unattainable and from which the court can reasonably infer that the business arrangement between the parties has been repudiated or terminated.

[Emphasis added.]

[42] The court went on to review the types of cases that do warrant court intervention:

[59] [T]he principle has been invoked in circumstances in which the acrimony renders the parties incapable of continuing to run a business, even if it has been profitable historically. The classic situation in which this has been applied is acrimony between two equal shareholders: see, for example, *Bondi Better Bananas Ltd., Re*, [1951] O.R. 845, [1951] O.J. No. 510 (Ont. C.A.) and *Yenidje Tobacco Co. Ltd., Re*, [1916] 2 Ch. 426 (Eng. C.A.). In the latter case, for example, the acrimony prevented the parties from making joint decisions thereby requiring them to resort to a highly impractical arbitration provision to resolve issues between them. In such a situation, the acrimony results in a failure of the most basic expectation of the parties -- a continuing ability to reach decisions collectively on significant matters affecting the business. It is a reasonable inference that, in such circumstances, the

parties intended the business association to terminate. Again, however, it is not the acrimony itself but the resulting inability of the parties to make decisions affecting the business that triggers the equitable winding-up.

[60] While not dispositive, the extent to which the differences prevent or, conversely, do not preclude, the possibility of business decisions being taken on an ongoing basis is a significant factor.

[61] Where the acrimony between the parties prevents such decision-making the court is able to infer that the intention of the parties is that the business relationship among them has been terminated as a result of the loss of mutual trust and confidence...

[Emphasis added.]

[43] Courts must remain alert to the possibility that a party is seeking to liquidate a corporation primarily or exclusively for the purposes of capitalizing on its assets, as the winding-up provisions of the BCA are not a mechanism to allow a party to monetize their investment: Boffo Family Holdings Ltd. at para 156; Vivian at para. 99; Hull Limited v. Bean Services Inc., 2013 BCSC 1208 at para. 95.

[44] Mr. Hawley relies heavily on Mr. Petersen's conduct as a basis for not granting the relief requested. As such, it is important to clarify the extent to which the court must, can, or should evaluate the conduct of the parties on such an application.

[45] Mr. Hawley relies in particular on the decision in 790668 Ontario Inc. v. D'Andrea Management Inc., 2017 ONCA 1019, where the Ontario Court of Appeal stated:

[14] When claims in equity are made, the court will not reward those who come with unclean hands. The trial judge was entitled to consider and make findings based on the appellants' conduct.

[46] It should be noted that the Court of Appeal for Ontario only provides that the court is entitled to consider and make findings. It does not state that the court must make findings on fault, nor does it state that such findings will necessarily be determinative.

[47] Furthermore, in the result, the Court of Appeal for Ontario upheld the lower court's decision declining to find oppression, notwithstanding that the court made the following finding regarding the conduct of the respondent to the appeal, Mr. Daney:

[16] We note that the trial judge did criticize Daney for his "clearly wrong" conduct in relation to his diversion of the benefit of the Fiberglass settlement to Newco. However, she noted that the agreement to repay the money resolved this dispute and resulted in the abandonment of the earlier derivative action. Further, she observed that the appellants offered no evidence that the amount payable to Daney for the guarantee or his management was unreasonable.

[48] Mr. Hawley also relies on the Ontario decision 2235512 Ontario Inc. v. 2235541 Ontario Inc., 2016 ONSC 7812 ("Ontario 223"), where the court stated:

- [54] I also accept the respondents' position that the court should not permit the applicant to rely on his own conduct to support his claim of deadlock. .
- [49] However, it should be noted that the court in that case had already concluded that the loss of mutual trust and confidence among the shareholders was insufficient to warrant liquidation and that, in any case, the parties were not in deadlock, as the "[t]he evidence indicate[d] that UniversalCare and the related companies can and do continue to operate despite these differences": Ontario 223 at paras. 50-53.
- [50] In *Animal House*, the clean hands doctrine was raised by the respondents. However, the court held that the applicant was not disentitled from seeking a remedy due to his conduct, instead finding that placing the blame squarely at his feet would be an "oversimplification" and "each of the three parties must bear responsibility in different ways for the state of conflict that exists between them": *Animal House* at para. 37.
- [51] In *Whiteside v. 1188683 Ontario Inc.* (2009), 50 B.L.R. (4th) 292, 2008 CanLII 51784 (Ont. Sup. Ct. J.), the court held that a party's alleged lack of clean hands was not sufficient to bar a liquidation order where both parties had acted "unilaterally": para. 32. In *Suleiman v. Saffuri* (2005), 48 B.L.R. (3d) 286 at para. 33, 2004 CanLII 11809 (Ont. Sup. Ct. J.), the court stated:

Saffuri relies on Suleiman's conduct as described above as grounds to disentitle Suleiman to any relief from this Court. He says that Suleiman is not coming to Court with "clean hands". In my view, Suleiman's conduct, although highly inappropriate, when viewed in light of his belief in its justification and the corresponding questionable conduct of the Respondents is not of such a magnitude so as to disentitle him to relief. The circumstances of this case are, in my opinion, more akin to those described by Farley J. in *Lumley v. Rodney's Oyster House Corp.*, [1999] O.J. No. 4167 (Ont. S.C.J. [Commercial List]), as follows:

Both sides have engaged in practices which are inappropriate and, if the one side were with clean hands, would not be tolerated as engaged in by the offending parties. The difficulty here is that both sides are rather grey - neither is all black or all white - and it would be an imposing, and rather meaningless task to attempt to sort out who was originally at fault since there seems to have been either a high degree of tolerance/condonation or alternatively, an unbelievable degree of naiveté.

That description applies equally to the facts before me.

[Emphasis added.]

- [52] If anything, B.C. courts have been even more reluctant to resolve disputes about who has "clean hands" on a liquidation application. In *Dia-Kas Inc. v. Virani et al.* (1997), 88 B.C.A.C. 26 at para. 22 (C.A.), in the context of an application to wind up a partnership, Justice Newbury stated as follows:

the clean hands doctrine is not a hard and fast rule that requires the court to inquire into and assign blame whenever a partnership is sought to be wound-up. The equitable remedy, being discretionary, may well be appropriate when the parties both appear to be at fault but are unable to carry on on the previous harmonious basis. When it becomes a matter of relative fault, the clean hands doctrine seems largely irrelevant to the practical issue of what should be done to bring the disagreement to an end. One suspects that the just and equitable jurisdiction will continue to be applied flexibly, as it was in *Safarik v. Ocean Fisheries* (1995) 12 B.C.L.R. (3d) 342 (B.C.C.A.), to address situations in which parties are excluded from participation, even where no fault may have been found.

In the case of the Chateau Granville, I am persuaded that the breakdown of the parties' relationship is complete and that regardless of the different allocations of fault or blame that might be made by a trial judge, there is no reasonable possibility that a different result would be reached at the end of a trial.

[Italics in original, underlining added.]

[53] Courts in British Columbia have continued to echo Justice Newbury's caution in *Dia-Kas Inc.* about the appropriateness of delving too deeply into each parties' alleged fault for disagreements underlying a deadlock. Justice Newbury's reasoning was recently relied upon in the context of an application to liquidate a corporation under s. 324 of the BCA: *Sohi v. Best Choice Blueberry Farms Limited*, 2018 BCSC 36 at para. 108.

[54] In *Mayer v. Mayer*, 2012 BCCA 77, in the context of oppression proceedings under the BCA, the Court of Appeal noted as follows:

[207] There is nothing in s. 227 or in the authorities provided by the parties that supports the view that good faith is a matter of substance at the outset of a proceeding under ss. 227 or 324. While it may become an issue if Mhinder ultimately seeks remedial derivative proceedings, that is not an express requirement in s. 227. Moreover, Mhinder also seeks other remedies that may obviate any wish to seek derivative relief. Thus, it is by no means clear that good faith will become a matter of substance even at a later point in the proceedings.

[208] I find support for these views in the comments of Kevin P. McGuinness in *Canadian Business Corporations Law*, 2d ed (Markham: LexisNexis, 2007) at 13.42:

There is no strict requirement that an applicant for relief have clean hands in order to obtain relief under the oppression remedy; nor is it necessary to show that the parties have behaved reasonably. In *Journet v. Superchef Food Industries Ltd.* Gomery J. rejected the argument that the right to institute an oppression proceeding was limited to complainants who could establish their own "perfect probity". He stated:

Furthermore, the court is not convinced that the clean hands doctrine applies to the recourse provided in s. 234. The statute does not say so or even require that the applicant be in good faith, a requirement when a complainant wishes to commence a derivative action under the C.B.C.A. ...

To require perfect probity from an applicant would imply that dishonest or improper management is sanctioned if no spotless complainant may be found to request the Court's intervention. That cannot have been the intention of the drafters of this legislation. Fault on the part of the complainant cannot excuse oppression and unfairness on the part of the corporation or its directors.

Nevertheless, the complainant's conduct is not an irrelevant consideration. The behaviour of the complainant may well be relevant to a determination of whether the steps taken by the management of the corporation were in the best interests of the corporation, or that the control group within the corporation was not acting unfairly in the circumstances. Even where this cannot be shown, it may affect the relief that the court is prepared to grant, or cause the court to exercise its discretion to refuse a remedy.

[Footnotes and citations omitted.]

[209] I am satisfied that while good faith may become an issue at the stage of remedy it is not a matter of substance at the pleading stage of an oppression claim.

[Emphasis added]

[55] In *Shasta*, Justice Skolrood commenced his analysis by stating:

[6] I note at the outset that the parties have very different interpretations of many of the background facts and events that ultimately led to this proceeding and these differences are reflected in the numerous affidavits filed. I do not intend to attempt to resolve these conflicts or to make findings of fact on disputed issues, nor do I need to in order to determine whether the relief sought in the petition should be granted.

[7] I note as well that the one thing not in dispute is the fact that there is a significant rift in the family and a high degree of animosity and distrust. The issue is what if anything is to be done about that, specifically in relation to the parties' shareholdings in *Shasta* and 4110.

[Emphasis added.]

[56] In his application of the test, Justice Skolrood concluded:

[84] Ted does not take significant issue with the suggestion that he and his brothers cannot work together, although he disputes where fault lies for that situation. Again, I do not need to resolve that dispute...

[Emphasis added.]

[57] In *Mortel Developments Co. v. Cottyn Construction Ltd.*, 1992 CanLII 1434 (B.C.S.C), the court stated:

If Mortel is to obtain either of the orders sought, it must be on the ground that by reason of the deadlock it is just and equitable that a receiver manager be appointed or Cobble Hill wound up. It seems to me that the law laid down in *Oakley v. McDougall*, is that it is not a condition precedent to the making of an order under s. 224(2) via s. 296 that the petitioner come to court with clean hands but that the court in the exercise of its very wide discretion can take into account questionable conduct on the part of the petitioner.

Given the pending of action No. 92-2936, I expressly refrain from making any finding or comment upon the conduct of Mortel and the cleanliness or otherwise of his hands. I find that there is a deadlock of such a kind as could justify the making of an order under s. 295(1) on just and equitable grounds but I am far from being satisfied that the time has come for the making of such an order. It seems to me that the parties, with the help of their advisers, should strive their utmost to find a solution which will avoid the necessity for the making of an order appointing a receiver manager or winding up Cobble Hill. Accordingly, I refuse the application for the time being and adjourn it for a period of three months, that is to say, it cannot be brought on before the week commencing February 8, 1993. On the other hand, in the mean time, the parties are at liberty to apply for an order falling within the wide discretion which the court has under s. 224(2) to make an interim or final order it considers appropriate

[Emphasis added.]

[58] In *Mostyn v. Schmiing*, 2011 BCSC 275, the court stated:

[18] In the absence of oppression, I do not consider it necessary to make findings as to how the present deadlock arose or to assess blame for it. It is simply a matter of determining the fairest and most efficient way to disentangle these parties

[59] In *Kidner Investments Ltd. v. Totem Mercury Holdings Ltd.*, 2017 BCSC 205, the court stated:

[76] There is no need to make findings as to how or why the deadlock has arisen or to assess blame for it. Rather, it is a matter of determining the fairest and most efficient way to disentangle these parties: *Mostyn*, at para. 18.

[60] Finally, in *Ten Hoeve*, the court stated:

[66] The evidence is clear that the mutual confidence upon which the Partnership Agreement was based has been shattered. There is no need for the Court to assess blame for why that happened. Rather, the Court's task is to determine the fairest and most efficient way to extricate the parties from their ongoing stalemate.

[61] Thus, in my view, the authorities demonstrate the following principles.

- a) Equitable remedies, such as winding-up a corporation, are highly discretionary: *Dia-Kas Inc.* at para. 22; *Boffo Family Holdings Ltd.* at para. 151; *Hui* at para. 61; *Esposito* at para. 9.

- b) What is "just and equitable" in the context of a family business may be different than in the context of a conventional commercial business, and determination thereof may require a more liberal interpretation: *Safarik* at paras. 100, 102; *Ten Hoeve* at para. 47; *Esposito* at para. 11; *Cote v. Milltown Marina & Boatyard Ltd.*, 2015 BCSC 2033 at para. 74; *Shasta* at para. 70; *Mioni v. Papais*, 2013 BCSC 1548 at para. 25; *Kular v. Wahlla*, 2011 BCSC 61 at para. 18; *Alleluia v. Wilson*, 2011 BCSC 666 at para. 76.
- c) When determining what is "just and equitable", a court must consider the reasonable expectations of the stakeholders in the context and with regard to their relationship: *Animal House* at para. 57; *Esposito* at para. 9; *Kular* at para. 16; *Callahan* at para. 53.
- d) In cases where mutual acrimony has created a situation where business partners are entirely incapable of collective decision-making, it is reasonable to infer that their intention is to terminate their business relationship: *Animal House* at para. 59.
- e) The winding-up provisions are not a mechanism to allow a party to monetize their investment: *Boffo Family Holdings Ltd.* at para 156; *Vivian* at para. 99; *Hull Limited* at para. 95; *Sohi* at para. 104.
- f) While a party's failure to come to the court with "clean hands" may be grounds to refuse equitable relief, such a determination falls within the discretion of the judge, and it is not an absolute bar: *Dia-Kas Inc.* at para. 22; *Sohi* at para. 57.
- g) Where, on an application for equitable relief, neither party before the court has "clean hands", the doctrine the court is not required to decipher which party bears more blame: *Dia-Kas Inc.* at para. 22; *Suleiman* at para. 33; *Mayer* at paras. 207-209; *Shasta* at para. 6; *Kidner Investments Ltd.* at para. 76; *Mostyn* at para. 18; *Ten Hoeve* at para. 66. However, the parties' conduct may still be relevant in contextualizing the conflict or determining whether the court should use its discretion to grant relief: *Mayer* at para. 208.

2. The Presence of Deadlock

[62] As Justice Skolrood noted in *Shasta*, deadlock "is one of the classic situations in which winding up is typically ordered": para. 95. See also: *Kinzie v. The Dells Holdings Ltd.*, 2010 BCSC 1360 at para. 10; *Mostyn* at para. 12; *Cariboo Western Lumber* at para. 45. In *Palmieri v. A.C. Paving Co.* (2000), 48 B.L.R. (2d) 130 at para. 28, 1999 CanLII 6117 (B.C.S.C), Justice Levine (as she then was) provided the following examples of circumstances that may lead to a finding that it is just and equitable to wind up a company:

there is an equal split or nearly equal split of shares and control; there is a serious and persistent disagreement as to some important questions respecting the management or functioning of the corporation; there is a resulting deadlock; and the deadlock paralyzes and seriously interferes with the normal operations of the company.

See also: *Kinzie* at paras. 10-11; *Callahan* at paras. 48-49; *Vivian* at para. 70.

[63] I find that that there is a deadlock here preventing Value's proper operation. Specifically:

- a) The parties have not held any director or shareholder meetings since the conflicts commenced. Such meetings would be the formal way in which their new conflict could be considered, and possibly addressed.
- b) That said, it is clear that any director or shareholder meeting here would still be deadlocked on most of the core disputes.
- c) The conflicts between the parties have risen all the way to the level of physical altercations.
- d) Mr. Hawley has prevented Mr. Petersen from accessing a computer server housing Value's information.
- e) Mr. Hawley has prevented Mr. Petersen from accessing the physical office that has been used by Value.
- f) Mr. Hawley has withdrawn money from Value's bank account without consultation with Mr. Petersen.
- g) Mr. Petersen has not deposited all funds that have come to him in his role with Value.
- h) Both Mr. Hawley and Mr. Petersen allege that the other has improperly appropriated Value's funds for their own benefit.
- i) Mr. Petersen believes that Mega Cranes' rent should be increased substantially, while Mr. Hawley disagrees.
- j) Mr. Petersen and Mr. Hawley do not agree on the amount of money owing between Value and Mega Cranes.
- k) The parties were unable to agree on an appropriate sale price for the Surrey Depot.
- l) The brothers' disagreements were impinging on Value's relationship with its renters.
- m) Mr. Hawley purported to appoint new auditors in a manner that, on its face, would seem to be contrary to the requirements of s. 209 of the BCA.

[64] These disagreements include matters that go to the substantive core of Value's business, being the establishment and collection of rents. There is also procedural deadlock in terms of the failure to call a shareholders' or directors' meeting, and the clear likelihood of a 50/50 split in any key vote if a meeting could be held. There is clearly "serious and persistent disagreement as to some important questions respecting the management or functioning" of the businesses and that these disagreements have "paralyze[d] and seriously interfere[d] with the normal operations of the company": Palmieri at para. 28; Vivian, para. 83. This deadlock weighs heavily in favour of the requested order: No. 20 CR Ventures Ltd. v. Andrex Developments (1985) Ltd., 2019 BCSC 405 at paras. 91-93.

3. Other Factors Relevant to what is "Just and Equitable"

- [65] Mr. Hawley is correct that a finding of deadlock alone is not necessarily sufficient to justify liquidation under s. 324 of the BCA. In light of the deadlock between the parties, the court must still determine whether liquidation is "just and equitable" in the circumstances. In this section, I consider additional factors beyond the existence of deadlock which may affect what is ultimately just and equitable in the circumstances of this case.
- [66] In the result, none of the other relevant factors that would cause me to conclude that liquidation is not just and equitable given the deadlock discussed above. Rather, the relevant additional factors favour granting the order.

Family Corporation

- [67] The fact that Value is a closely held family corporation further supports the granting of the order: *Safarik* at paras. 100, 102; *Ten Hoeve* at para. 47; *Cote* at para. 74; *Shasta* at para. 70; *Kular* at para. 18; *Alleluia* at para. 76; *Mioni* at para. 25
- [68] This is not a situation, as in *Animal House*, where the acrimony between the family members did not prevent the directors from agreeing on important issues and continuing to operate the companies: paras. 102 and 105. The primary respondent in *Animal House* still had effective legal control of the corporation: paras. 2, 80, and 85-87. Similarly, in *Shasta*, the family acrimony did not support an order because the majority shareholders still had the ability to move the current operations of the company forward without the engagement of the minority shareholder: paras. 101-103.

Partnership Analogy

- [69] I find that this case fits the partnership analogy as:
- a) the company was formed by brothers with a personal relationship;
 - b) the brothers adopted an equal ownership structure;
 - c) the brothers both actively worked in the business; and
 - d) the brothers declined to follow corporate formalities for much of their business relationship.

See *Vivian* at para. 72.

- [70] The facts demonstrate a rupture in the partnership. Specifically, there is:
- a) a breakdown of the mutual trust and confidence upon between the parties;
 - b) a destruction of the good faith underlying the original agreement to begin the partnership;
 - c) a justifiable lack of mutual confidence in the conduct of the company's affairs, insofar as there is a lack of probity, good faith, and allegations of improper conduct;

- d) a failure to coordinate on the affairs of the business, continued quarreling, and such a state of animosity that all reasonable hopes of reconciliation and friendly cooperation are precluded; and
 - e) a situation where it is impossible for the partners to maintain the reasonably expected confidence in each other necessary to continue the affairs of the business, and no particular party is culpable for the state of affairs.
- [71] The brothers' quasi-partnership has now clearly broken down. This further supports the granting of the order.

Conduct of the Parties

- [72] While I am entitled to consider the conduct of the parties, I find that the evidence does not leave me with a sufficient basis for concern about Mr. Petersen's conduct such that I would conclude that he should be deprived of the order he seeks. This is particularly so given the careful approach B.C. courts have followed when asked to resolve fault for any deadlock.
- [73] While there is a dispute between the parties as to who is the cause of the deadlock, I do not find that the evidence supports a determination that Mr. Petersen's conduct is so clearly the cause of the deadlock that the court should decline to issue an order on that basis.
- [74] Furthermore, any attempt to assess fault is complicated by the fact that some of the parties' allegedly blameworthy conduct was perpetrated while acting in their respective roles with Mega Crane. Any conduct in relation to Mega Crane is the subject of separate proceedings.
- [75] I am of the view that apportioning fault at this point is "largely irrelevant to the practical issue of what should be done to bring the disagreement to an end" and that "each of the parties bear[s] responsibility in different ways for the state of conflict that exists between them": *Dia-Kas Inc.* at para. 22; *Animal House* at para. 37. Neither of these grown men should be engaged in fisticuffs. Neither of them should be withholding funds from the corporation. Neither of them should be withdrawing or withholding corporate funds to the exclusion of the other. There is fault to be shared.
- [76] Finally, I am concerned that refusing to grant the remedy on this basis would simply leave Value in a state of limbo, unable to determine who controls the company's funds, unable to establish the rents that form its income, and unable to even hold a constructive meeting.

Monetizing Investment

- [77] In relation to the concern expressed in *Boffo Family Holdings Ltd.* at para. 156, I do not find that the request for such order is simply a vehicle to allow Mr. Petersen to monetize his investment. This is not a case that is "exclusively or primarily [driven] by a desire to monetize an investment": *Sohi* at para. 104; *Reading v. Wardell*, 2021 BCSC 2106 at para.38. There are substantive disagreements on the current management and future direction of Value that go well beyond simply finding a way for Mr. Petersen to extract himself from the

company.

Reasonable Expectations

[78] In relation to reasonable expectations, it is important to note that this consideration is not focussed exclusively on the actual expectation of a particular stakeholder: Callahan at para. 20. The question is whether the expectation is reasonable having regard to:

- a) the facts of the specific case;
- b) the relationships at issue, and the entire context, including commercial practice;
- c) the nature of the company;
- d) the relationships between the applicant and the other corporate actors;
- e) past practice;
- f) whether the applicant could have taken steps to protect itself against the prejudice he claims to have suffered;
- g) any agreements and representations; and
- h) the fair resolution of conflicting interests between corporate stakeholders.

Callahan at para. 22.

[79] While it may have been the intention at the outset that Value simply serve as a nominal passive landlord for the operational company, Mega Cranes that expectation has clearly changed. Reasonable expectations are not frozen in time and can evolve: Boffo Family Holdings Ltd. at para. 112; Callahan at para. 24. Any expectations the parties may have held when Value was incorporated changed when:

- a) Value started investing in properties in which Mega Cranes had no interest and no role; and
- b) Mr. Hawley adopted the position that Mr. Petersen was not an equal shareholder in Mega Cranes, creating a situation where a more formal approach had to be taken in relation to the accounting issues as between the two companies.

[80] Faced with this new reality, there would necessarily have been a reasonable expectation that the brothers would actively cooperate in relation to all aspects of Value's business, as Value could not (or could no longer) be treated as a mere pawn of Mega Cranes.

[81] Paraphrasing Justice Skolrood's comments in Shasta at para. 93, the problem here is that Value's corporate structure is such that no single brother could reasonably expect to make decisions concerning Value that were at odds with the wishes of the other. This contrasts with the situation in Animal House, where the successful respondent's control of 2/3 of the shares governed the losing applicant's reasonable expectations. The court in Animal House noted as follows:

[59] Similarly, the principle has been invoked in circumstances in which the acrimony renders the parties incapable of continuing to run a business, even if it has been profitable historically. The classic situation in which this has been applied is acrimony between two equal shareholders: see, for example, *Re Bondi Better Bananas Ltd.*, [1951] O.R. 845, [1951] O.J. No. 510 (C.A.) and *Re: Yenidje Tobacco Co. Ltd.*, [1916] 2 Ch. 426 (C.A.). In such a situation, the acrimony results in a failure of the most basic expectation of the parties -- a continuing ability to reach decisions collectively on significant matters affecting the business. It is a reasonable inference that, in such circumstances, the parties intended the business association to terminate. Again, however, it is not the acrimony itself but the resulting inability of the parties to make decisions affecting the business that triggers the equitable winding-up.

[Emphasis added.]

[82] This is precisely the scenario here: a deadlock between brothers with equal shareholding such that neither party can reasonably be expected to control the business alone.

4. Appropriate Remedy

[83] The court has a broad range of remedies available to it once a finding is made that the "just and equitable" test under s. 324(1) is met. Subsection 324(3) provides that the court may make an order that the company be liquidated or dissolved, but it may also make any order under s. 227(3) that it considers appropriate. Subsection 227(3) has a very long list of other available remedies.

[84] That said, Mr. Petersen only sought liquidation, and Mr. Hawley only sought an order that the matter be put on the trial list. Neither party proposed an order for a shotgun buyout, apparently due to the fact that neither has the resources to buy out the other at this time. As such, I do not find it necessary to engage in a detailed review of the alternative s. 227(3) remedies.

[85] Subject to my comments on terms below, I find that the requested order that the company be liquidated and dissolved is appropriate. I find that this situation is akin that which this court faced in *J & A Properties Ltd.*, where the court concluded as follows:

[54] It may be time-consuming and costly to have a liquidator in place. These costs could have been avoided with better cooperation, but that is not to be. With a company of this value, it is "just and equitable" that it receive the benefit of proper management through this crucial period. Given the value of the properties, the cost of the appointment is likely to be reasonably proportional to the amounts at issue.

[86] I also rely on the decision of the Saskatchewan Court of Appeal in *Gilliss v. Phillips*, 2008 SKCA 120:

- [7] [It] was clear from the argument heard during the course of the appeal that there is no longer any cooperation at all between the parties and no hope of cooperation in the future. Intractable differences remain between the parties over matters such as the value, if any, of goodwill, and whether the parties should be obliged to give personal non-competition covenants to any purchasers of the company's shares or assets, and those differences prevent any sale on terms acceptable to both of the parties. A further complication is money taken from RDT Rentals Limited to develop the Bulldog clamp and the insolvency of the companies that received and spent the money. These various differences and problems also preclude remedies other than liquidation, as contemplated by s. 234 of The Business Corporations Act. These circumstances lead to the conclusion that liquidation is the only reasonable solution.
- [87] I also agree that Bowra Group Inc. should be appointed as the liquidator.
- [88] Mr. Hawley offered alternative submissions in relation to certain directions that he suggests could be given to the liquidator. In particular, Mr. Hawley suggested that the liquidator be directed to first take steps to sell certain properties, as the proceeds from an early partial sale may put Mr. Hawley in a position whereby he or his companies could purchase the remaining Value Properties.
- [89] Rather than tie the liquidator's hands in this way, I find that a more appropriate means of encouraging the parties to adopt the most rational economic approach is to stay the appointment of the liquidator for 60 days. It may be that, with the benefit of these reasons, the parties will see the wisdom of a refined mutual agreement, rather than a blunt force of a liquidation. I note that a similar delay was effectively imposed in Mortel Developments Co. As it stands, I do not have sufficient confidence that the court is in an adequate position to determine the appropriate sequence or timing of sales that would yield the best outcome. That should be left to the parties or the liquidator. The liquidator will have the power to seek further court direction as required.

C. Conversion to an Action

- [90] Although the outcome of Mr. Hawley's application to convert this proceeding into an action should be clear from the analysis above, I will address it separately for sake of completeness.
- [91] The test for converting a petition proceeding to a conventional action is whether there is a dispute as to facts or law which raises a reasonable doubt, or which suggests there is a defence that deserves to be tried: *Douglas Lake Cattle Co. v. Smith* (1991), 54 B.C.L.R. (2d) 52 at para. 36 (C.A.); *Bassett-Smith v. Protech Consultants* (1989) Ltd., 2006 BCSC 803 at para 3.

- [92] Mr. Hawley argues that the petition ought to be converted into a trial pursuant to R 22-1(7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, with examinations for discovery, document discovery, and examinations of witnesses, all of which would ensure an overall fair process: *Cheema v. Kalkat*, 2009 BCSC 56 at para. 9.
- [93] For all of the reasons expressed above, I find that I have adequate facts at this stage to allow me to issue the remedy requested. In particular, I have concluded that it is not necessary for me to resolve who is correct or at fault on each of the points of deadlock. It is enough for me to be able to conclude that there is a deadlock, and that it is "just and equitable" to order liquidation and dissolution.

V. CONCLUSION

- [94] Mr. Petersen's request for appointment of a liquidator is granted, but the operation of this order shall be stayed for 60 days to allow the parties to determine whether they can arrive at alternative consent orders during this period.
- [95] Mr. Hawley's request that the petition to be converted into an action is dismissed.
- [96] If the parties cannot agree on costs, they may make submissions in writing on the following schedule:
- a) Mr. Petersen's submission: 15 pages or less within 30 days of this judgment;
 - b) Mr. Hawley's response: 15 pages or less within 30 days of the receipt of Mr. Petersen's submission; and
 - c) Mr. Petersen's reply: 5 pages or less within 15 days of the receipt of Mr. Hawley's response.

"Branch J."

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