

CANADA / JUDGMENT

Southpaw Credit Opportunity Master Fund LP v. Asian Coast Development (Canada) Ltd.

2013 BCSC 187

COURT

Supreme Court of British Columbia

DECIDED

6 February 2013

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2013 BCSC 187 Southpaw Credit Opportunity Master Fund LP v. Asian Coast Development (Canada) Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Southpaw Credit Opportunity Master Fund LP v. Asian Coast Development (Canada) Ltd.,

2013 BCSC 187

Date: 20130206

Docket: S111477

Registry: Vancouver

Between:

Southpaw Credit Opportunity Master Fund LP, Southpaw Asset Management LP, Wilshire Institutional Master Fund SPC-Wilshire Southpaw Opportunity Seg Port, GPC 76, LLC and Old Westbury Funds, Inc.

Petitioners

And

Asian Coast Development (Canada) Ltd., Harbinger Capital Investments S.à.r.l., Harbinger Capital Partners Master Fund I, Ltd., Harbinger Capital Partners Special Situations Fund, L.P., Blue Line ACDL, Inc., Breakaway ACDL, Inc., and Harbinger II S.à.r.l.

Respondents

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Petitioners:

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Counsel for the Respondents Harbinger Capital Investments S.à.r.l., Harbinger Capital Partners Master Fund I, Ltd., Harbinger Capital Partners Special Situations Fund, L.P., Blue Line ACDL, Inc., Breakaway ACDL, Inc., and Harbinger II S.à.r.l.:

B. Bresner

K. Beitel

Place and Date of Hearing:

Vancouver, B.C.

September 10-13, 2012

Place and Date of Judgment:

Vancouver, B.C.

February 6, 2013

I. Introduction

- [1] This is an oppression proceeding that has been brought by the petitioners, investment management funds based in New York, against the respondent Asian Coast Development (Canada) Ltd. ("ACDL") and the respondents Harbinger Capital Investments S.à.r.l., Harbinger Capital Partners Master Fund I, Ltd., Harbinger Capital Partners Special Situations Fund, L.P., Blue Line ACDL, Inc., Breakaway ACDL, Inc. and Harbinger II S.à.r.l. (collectively "Harbinger"), which are investment fund managers or investment funds also based in New York. Harbinger II is currently the largest shareholder of ACDL. The other Harbinger respondents are affiliates of Harbinger II.
- [2] The central complaint advanced by the petitioners is that through two loan transactions ACDL received money from Harbinger on what are alleged to be very harsh terms. It is alleged that the terms were so harsh as to disrupt ACDL's efforts to raise additional capital, which in the end resulted in ACDL entering into a transaction with Harbinger that had the

effect of severely diluting the value of the petitioners' shares. The specific complaint advanced is ACDL's failure to have sought financing on more preferential terms from the petitioners.

II. Procedural History

- [3] This proceeding was commenced by way of petition. The petition was amended on April 11, 2011.
- [4] In April 2011, the parties agreed to a timetable that provided for the exchange of affidavits, including expert affidavits, the exchange of documents, cross-examination on affidavits, the exchange of written arguments and the hearing of the petition. The hearing of the petition was set for five days commencing November 28, 2011. This was at the request of the petitioners' counsel in order to accommodate the possibility of conducting cross-examinations during the hearing.
- [5] Harbinger and ACDL served responding affidavits in June 2011. On June 29, 2011, the petitioners delivered a list of documents that they were seeking from the respondents. On August 8, 2011, the respondents produced most of the documents requested by the petitioner, but refused to produce some of them.
- [6] The petitioners then applied for an order for further production of documents. ACDL and Harbinger agreed to produce some of the categories of requested documents. On August 11, 2011, Madam Justice Gray ordered the respondents to produce certain categories of documents and to use their best efforts to produce the documents by September 2, 2011.
- [7] The petitioners' counsel then advised the respondents that, having reviewed the documents produced pursuant to the order of Gray J., a tort action against Harbinger for intentional interference with economic relations was being considered.
- [8] The petitioners then brought an application seeking orders converting this proceeding into an action, granting leave to file a notice of civil claim against Harbinger (the "Tort Claim"), and permitting the Tort Claim and the oppression claim advanced in the petition (the "Oppression Claim") to be advanced in a single proceeding. In the alternative, the petitioners sought leave to make use of the documents that have been produced by the respondents in this proceeding to commence the Tort Claim against Harbinger, and to use the documents produced in the Oppression Claim in the prosecution of the new action.
- [9] In reasons indexed at 2012 BCSC 14, the following relief was granted:

In the result, having regard to the applicable test and to the factors to be addressed, I have concluded that at present, Southpaw has not met the onus for conversion of the proceedings. The application to convert this proceeding into an action is dismissed with liberty to renew the motion after the cross-examinations on affidavits have been conducted. In addition, as noted above, the petitioners are granted leave to make use of documents that have been produced by the respondents in this proceeding to commence a new action claiming damages in tort from the

respondents Harbinger Capital Investments S.à.r.l. and Harbinger Capital Partners Master Fund I, Ltd. and to use the documents in the prosecution of the new action.

- [10] The petitioners did commence an action in tort against Harbinger, but that claim is not ready for trial. The parties proceeded with the cross-examinations. The petitioners did not renew their application to convert the petition into a trial or to have the matter tried with the tort action.

III. Facts

A. The Parties

- [11] ACDL is a small real estate development company that is based in Vancouver. It was incorporated on July 18, 2006 under the Canada Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA"), and continued under the British Columbia Business Corporations Act, S.B.C. 2002, c. 57 ("BCBCA"), in the fall of 2010. This proceeding is subject to the provisions of the CBCA.
- [12] ACDL was founded with the objective of developing luxury casinos and resorts on the Ho Tram Strip in Phuc Thuan Village, Xuyen district, Ba Ria, Vung Tau Province in Vietnam. The development plan includes hotels, conference space, casinos, a golf course, retail shopping areas and restaurants at a total estimated cost of US \$4.2 billion ("the Project").
- [13] Between January 2009 and April 2010, the independent directors of the company were Robert Wolfe, David Tsubouchi and Jack Maier, all of whom were experienced business persons. The management directors during that time, who were also the founders of the company, were Michael Aymong and David Subotic. In late April 2010, Messrs. Aymong and Subotic resigned and Mr. Wolfe became Chair of the Board.
- [14] In 2009, the management team consisted of Mr. Subotic, chief executive officer; Mr. Aymong, Chair of the Board; Stephen Shoemaker, president and chief financial officer; and John Legge, in-house counsel. In April 2010, Messrs. Subotic and Aymong ceased to be involved in management and Lloyd Nathan, formerly with MGM, became a director of the company and its chief executive officer.
- [15] In March 2008, ACDL secured a licence from the national and provincial governments of Vietnam to fund, construct and operate the Project ("the Investment Certificate"). In order to obtain the Investment Certificate, ACDL was required to commit to a number of deadlines to raise equity and debt financing and to construct the Project in a timely fashion. The Investment Certificate was subject to revocation in the event that ACDL failed to meet any of these deadlines.

- [16] Ho Tram Project Company Limited ("HTP") is a Vietnamese corporation that is a wholly owned subsidiary of ACDL. HTP was formed pursuant to the Investment Certificate. At the material time, the principal assets of HTP were the Investment Certificate and a land lease for the Project site. At the material time ACDL's principal asset was its interest in HTP.
- [17] Harbinger Capital Partners LLC ("Harbinger Capital") is a private investment firm based in New York that specializes in distressed credit, event driven and value investing strategies. Harbinger Capital was the first institutional investor in ACDL, making its investments through subsidiaries named as respondents in the proceeding: Harbinger Capital Investments S.à.r.l., Harbinger Capital Partners Master Fund I, Ltd., Harbinger Capital Partners Special Situations Fund, L.P., Blue Line ACDL, Inc., Breakaway ACDL, Inc. and Harbinger II S.à.r.l.
- [18] The petitioner, Old Westbury Funds, Inc., is a legal entity that represents the Old Westbury Global Opportunity Fund ("GOF"), which made an investment in ACDL in 2008. Bessemer Investment Management LLC provides investment management services to Old Westbury Funds Inc. (collectively "Bessemer").
- [19] The GOF specifically invests in speculative and high risk securities including investments in emerging markets and below investment grade securities. It caters to sophisticated investors and high net worth investors looking for risky investments in foreign countries. At the material times Gregory Lester was the portfolio manager responsible for the GOF.
- [20] The petitioner, Southpaw Credit Opportunity Master Fund LP, is a New York based investment firm managed by Southpaw Asset Management LP. Wilshire Institutional Master Fund SPC-Wilshire Southpaw Opportunity Seg Port and GPC 76, LLC, are accounts managed by the principals of Southpaw Asset Management LP. All of these entities (collectively "Southpaw") held shares in ACDL.
- [21] Southpaw has an institutional relationship with Bessemer, which invests Southpaw's funds. Southpaw focuses in placing corporate credit investments primarily in stressed and distressed securities. Southpaw caters to sophisticated and high net worth investors who have a tolerance for risk and the financial ability and willingness to sustain a loss of their investment. Southpaw was founded by Howard Golden and Kevin Wyman who shared the decision-making authority in respect of Southpaw's investment in ACDL.

B. Harbinger's Initial Investments

- [22] Harbinger made its original investment in ACDL in April 2007. It was the first institutional investor in ACDL and as a result of its early investment secured a number of preferential rights including rights of first refusal and/or consent in respect of future debt and equity financing and a broad security interest in all of ACDL's assets.

[23] On April 17, 2007, prior to issuance of the Investment Certificate by the Vietnamese government and prior to any investment by the petitioners, Harbinger invested \$35 million of venture capital in ACDL (the "Start-up Investment"). Pursuant to the Start-up Investment, Harbinger negotiated and entered into:

- (i) a subscription agreement for 250,000 Preferred Special Shares, 1 million Common Special Shares and warrants representing 6.6% of the fully-diluted equity of ACDL;
- (ii) a shareholders' agreement (the "2007 Shareholders' Agreement") with ACDL and certain of the other shareholders of ACDL (the "Principal Shareholders");
- (iii) a Put Option Agreement with ACDL and its subsidiaries, which provided that, in the event of a default by ACDL, Harbinger could compel ACDL to repurchase the preferred shares for over \$25 million;
- (iv) General Security Agreements with ACDL and its subsidiaries, providing Harbinger with security over all of the assets of ACDL and its subsidiaries; and
- (v) a Voting Trust Agreement with ACDL and the Principal Shareholders.

The 2007 Shareholders' Agreement, the Put Option Agreement, the General Security Agreements and the Voting Trust Agreement will be referred to as the "2007 Transaction Documents".

[24] The 2007 Transaction Documents provided Harbinger with a bundle of rights, including:

- that ACDL would not issue any additional equity or incur any debt without Harbinger's prior written consent, which was not to be unreasonably withheld;
- if there was an event of default as defined under the 2007 Shareholders' Agreement, ACDL agreed to ensure that Harbinger could nominate the majority of the board of whatever entity held the Investment Certificate and Lease Agreement (later, HTP);
- if there was an event of default under the 2007 Shareholders' Agreement, the Principal Shareholders who were parties to the Voting Trust Agreement would deliver their shares to Harbinger and permit Harbinger to vote those shares, representing approximately 24% of the outstanding common shares;
- a right of first refusal for 50% of the issuance of any equity or debt by ACDL; and
- the right to enforce its security over all of the assets of ACDL and HTP.

[25] Harbinger made additional equity investments in ACDL on October 25, 2007, February 8, 2008 and April 30, 2008. By April 30, 2008, Harbinger had invested approximately \$42 million in ACDL.

C. Southpaw's Initial Investment

- [26] Southpaw was the second institutional investor in ACDL, making its initial investment in June 2007. It purchased 301,277 common shares in ACDL at \$10 per share for an aggregate purchase price of \$3,012,770. At the time of its investment Southpaw conducted an extensive due diligence process which included review of ACDL's confidential web-based data site which contained all of ACDL's material corporate agreements and organizational information, including the 2007 Transactional Documents. Thus, at the time of its investment, Southpaw was aware that Harbinger was an existing investor with a senior position in the capital structure.
- [27] Southpaw made its investment pursuant to a formal subscription agreement in which it acknowledged that:
- (a) Southpaw had access to all the information that it considered necessary as part of its investment decision to invest in the common shares of ACDL (s. 4.2 (e));
 - (b) Southpaw had an opportunity to review and access ACDL's material agreements, including Harbinger's shareholder rights (s. 4.2(t));
 - (c) there were significant risks associated with the purchase of, and investment in, the common shares of ACDL (s. 4.2(s));
 - (d) ACDL and any of its subsidiaries could complete additional financings concurrently or in the future in order to develop the business of the Company and to fund its ongoing development and that there was no assurance that such financings would be available and, if available, on reasonable terms; and any such future financings could have a dilutive effect on current security holders, including Southpaw (s. 4.2(aa)); and
 - (e) the purchase of the shares of ACDL was a highly speculative investment and that the investment in the shares was suitable only to sophisticated investors and required the financial ability and willingness to accept the possibility of the loss of all or substantially all of Southpaw's investment as well as the risks and lack of liquidity inherent in an investment in ACDL (s. 4.2(mm)).
- [28] Mr. Golden acknowledged on cross-examination that, based on the representations of ACDL and the acknowledgements of Southpaw in each of the subscription agreements, Southpaw:
- (i) was aware of Harbinger's security interest over the assets of ACDL, and understood and expected that its investments were subject to the security interest in favour of Harbinger;
 - (ii) was aware that Harbinger held two series of special shares of ACDL, and understood and expected that its investments were subject to those special rights;

(iii) was aware of the material contracts disclosed in Schedule B to the Southpaw Subscription to its agreements, including Harbinger's financing documentation, which it acknowledged receiving, and understood and expected that its investments were subject to those material contracts;

(iv) was aware, and understood and expected, that its investments were subject to significant risks;

(v) was aware, and understood and expected, that ACDL might complete additional financings and that there was no assurance that such financings would be available or, if available, that such financings would be on reasonable terms;

(vi) was aware, and understood and expected, that ACDL might complete additional financings and that such financings could be dilutive to Southpaw's equity interest in ACDL; and

(vii) was aware and understood and expected, that its investments in ACDL were speculative, and were only for sophisticated investors who were willing to accept the possibility that all or substantially all of their investment might be lost.

D. Default

[29] As of July 2007, ACDL was in default under the terms of the 2007 Transaction Documents. In light of this default, Harbinger was in a position to exercise its put option and its security and to seize all of the assets of the Company.

[30] Given Harbinger's right to act on its security interests, ACDL was required, on several occasions, to obtain the consent of Harbinger to forbear from enforcing its rights under its various agreements. ACDL sought and secured Harbinger's agreement to forebear from exercising its rights. Harbinger's initial forbearance was stated to be conditional upon curing the defaults relating to the Investment Certificate and Lease Agreement on or before October 1, 2007. Harbinger reserved its rights in the event of further acts of default. Forbearance agreements were sought by ACDL and entered into between ACDL and Harbinger on July 16, 2007, September 28, 2007, April 7, 2008, October 31, 2008, March 20, 2009, October 31, 2009 and January 29, 2010.

E. Subsequent Investments

[31] In October 2007, Harbinger purchased 255,000 common shares at \$10 per share. Harbinger purchased 437,478 common shares at \$10 per share in February 2008.

[32] Southpaw purchased 100,000 common shares at \$10 per share in October, 2007. In February 2008, Southpaw purchased 45,000 common shares at \$10 per share. Prior to this purchase, Southpaw representatives had accessed various documents from the ACDL website. Given its access to the confidential website, at the time of this purchase Southpaw either was aware, or should have been aware of the state of ACDL's default and of Harbinger's forbearance. Southpaw's total investment in ACDL was 446,277 common shares for an investment of

\$4,462,770.

F. Investment Certificate

- [33] As noted above, ACDL had obtained the Investment Certificate from the Government of Vietnam in March 2008. The Investment Certificate outlines the terms under which the Project is to be developed, including specific details regarding the scheduled completion of the various phases of the Project.
- [34] In order to obtain the Investment Certificate, ACDL was required to make a number of commitments relating to the financing and completion of the Project. In particular, ACDL represented that it had the ability to raise charter capital in the amount of \$795 million (the "Charter Capital") and committed to arranging for total investment capital of up to \$4.23.
- [35] In addition, under the terms of the Investment Certificate, ACDL committed to start construction on Phase 1 by September 2008 and make Charter Capital contributions in the amount of \$105 million by December 2009.
- [36] On April 7, 2008, Harbinger and ACDL entered into a further forbearance agreement in relation to three events of default: ACDL's failure to enter into the Lease Agreement (the Investment Certificate had been granted on March 12, 2008) (the "Lease Condition"); its failure to obtain all required licences, consent and government approvals in relation to the development (the "Approvals Condition"); and, its failure to obtain the required financing within 12 months of closing of the Start-up Investment, as required by the 2007 Shareholders' Agreement (the "Mandatory Financing Condition"). Satisfaction of the Mandatory Financing Condition required ACDL to raise \$300 million in financing.
- [37] Pursuant to the forbearance agreement, Harbinger agreed to forbear from exercising its rights under the 2007 Transaction Documents until:
- (i) June 30, 2008 in relation to the Lease Condition;
 - (ii) October 31, 2008 in relation to the Approvals Condition; and
 - (iii) December 31, 2008 in relation to the Mandatory Financing Condition.
- [38] On June 20, 2008, Harbinger and ACDL amended the April 7, 2008 forbearance extending the date in relation to the Lease Condition to July 15, 2008.

G. Bessemer Investment

- [39] In July 2008, Harbinger purchased an additional 150,000 common shares at \$40 per share. Bessemer then became the third institutional investor in ACDL, making its investment in July 2008. Bessemer purchased 500,000 common shares of ACDL at \$40 per share for an aggregate purchase price of \$20 million. Like Southpaw, Bessemer conducted due diligence prior to making the investment.

- [40] The Bessemer Subscription Agreement was very similar to the Southpaw subscription agreements. In its agreement, Bessemer specifically acknowledged and agreed that:
- (a) Bessemer had evaluated ACDL and its investment in the shares and Bessemer had performed due diligence to its satisfaction (s. 4.2(g));
 - (b) Bessemer had an opportunity to review and access ACDL's material agreements, including Harbinger's shareholder rights (s. 4.1(s));
 - (c) ACDL had provided Bessemer with access to information concerning the Company, the business, the Project and the shares as considered necessary by Bessemer (s. 4.2(e));
 - (d) there were significant risks associated with the purchase of, and investment in, the common shares of ACDL (s. 4.2(u));
 - (e) ACDL and any of its subsidiaries could complete additional financings concurrently or in the future in order to develop the business of the Company and to fund its ongoing development and that there is no assurance that such financings will be available and, if available, on reasonable terms; and any such future financings may have a dilutive effect on current security holders, including Bessemer (s. 4.2(dd));
 - (f) Bessemer understood the terms attaching to the Series I and Series II Special Shares of ACDL and that the holder of such shares was entitled to convert such shares to common shares, which conversion would have a dilutive effect (s. 4.2(ee));
 - (g) ACDL may not be able to proceed with or complete the Project and the Investment Certificate may be revoked if ACDL could not complete additional financings (s. 4.2(ff));
 - (h) a majority of the voting rights of ACDL were subject to the terms and conditions of the Shareholders' Agreement (s. 4.2(rr)); and
 - (i) the purchase of the shares of ACDL was a highly speculative investment and that the investment in the shares was suitable only to sophisticated investors and required the financial ability and willingness to accept the possibility of the loss of all or substantially all of Bessemer's investment (s. 4.2(vv)).
- [41] In making its investment, Bessemer expressly negotiated for certain additional protection against the risk of dilution. In particular, Bessemer bargained for an anti-dilution protection contained in s. 5.6 of the Bessemer Subscription Agreement, which provided for certain limited protection during ACDL's early capital raises (the "Price Protection Clause"). However, this protection was limited in duration and it was subject to certain thresholds. Southpaw did not bargain for any similar protection.

H. World Financial Crisis

- [42] Between September 2006 and July 2008, ACDL completed approximately nine rounds of financing in which it had raised approximately \$78 million. These initial financing rounds included the initial investments placed by Harbinger, Bessemer and Southpaw.
- [43] However, shortly after ACDL obtained the Investment Certificate in March 2008 and shortly after Bessemer and Southpaw made their respective investments, the world economy went through a financial crisis that culminated in the collapse of Lehman Brothers in September 2008. The financial crisis resulted in a global contraction of credit, and it had a significant effect on ACDL's ability to raise the necessary debt and equity financing. Many of the institutional and private investors that had expressed interest advised that they were no longer interested or were not able to raise the necessary funds. This lack of financing put ACDL into a perilous position, since (i) ACDL had committed to specific milestones for financing to the Government of Vietnam, and (ii) a failure to meet those milestones would place the Investment Certificate, and by extension, the future of the Company at risk.
- [44] In December 2008, ACDL approached the Government of Vietnam to request certain amendments to the Investment Certificate, in part, as a result of the financial crisis. ACDL sought, among other things, approval to reduce the size and scale of the first phase of the Project ("Phase 1") and certain changes to the schedule for the Charter Capital contributions. A revised schedule was agreed upon in early July 2009.
- [45] Bessemer marked down its investment in ACDL by 25% in January 2009. Southpaw similarly marked down its investment, and Southpaw transferred its investment in ACDL to a "side-pocket" that was outside the fund due to its lack of liquidity.

I. Fund Raising 2008 - 2009

- [46] In April 2009, ACDL, through HTP, entered into a term sheet (the "BIDV Term Sheet") with a syndicate of Vietnamese banks led by Bank for Investment and Development of Vietnam ("BIDV"), a state-owned commercial bank in Vietnam, to fund approximately 45% of the project costs required for Phase 1 of the Project, in the amount of up to \$207 million. In order to secure the BIDV Term Sheet, ACDL committed to raising \$230 million of project funding for Phase 1, later reduced to \$150 million. The BIDV Term Sheet expired in October 2009, but additional term sheets were re-issued by BIDV on several occasions.
- [47] In May 2009, ACDL retained two prominent investment banks, Moelis & Company ("Moelis") and Macquarie Group International ("Macquarie"), to assist with its efforts to raise equity. Pursuant to these engagements, ACDL was seeking a private placement to generate proceeds of at least \$120 million, later increased to \$150 million. Starting in the late summer of 2009, Moelis and Macquarie began contacting a long list of strategic and financial investors and qualified high net worth individuals to solicit their interest ACDL.

- [48] Road shows were held in Asia and North America in September 2009. At these road shows, ACDL met with many potential investors in the hopes of securing equity investment in the Project. However, in spite of these efforts, ACDL was unable to attract a committed equity investor.
- [49] During this period, and throughout the process, ACDL kept Harbinger, Bessemer and Southpaw apprised of its marketing activities and the current status of the debt and equity financing process. Southpaw also received periodic updates from Guggenheim, another of the Company's early financial advisors, on behalf of the Company. ACDL circulated financial statements periodically, and ACDL's data site remained accessible to investors.
- [50] On several occasions, ACDL actively solicited Bessemer and Southpaw to make an additional investment in the Company. However, from the outset of these events, Mr. Golden advised ACDL that Southpaw was not interested in making any further investment in the Company due to its small fund size and its related inability to take on any additional exposure to the Project. Mr. Golden specifically told ACDL's management that Southpaw could not make anything other than a "token" investment because he and Mr. Wyman were trying to raise money for a new, second fund, but that they were having difficulties in doing so. On cross-examination, Mr. Golden agreed that he had repeatedly declined offers made by ACDL to make an additional investment.
- [51] By the summer of 2009, Harbinger had agreed to forbear from enforcing its rights and remedies under its agreements with ACDL on a number of occasions. The then current forbearance agreement with Harbinger dated March 20, 2009, required ACDL to satisfy the Mandatory Conversion condition by no later than October 31, 2009.
- [52] By the summer of 2009, ACDL had not started full-scale construction for Phase 1 of the Project, largely due to its inability to secure the necessary equity funding. There was reason for ACDL to be concerned that if it did not commence construction for Phase 1 in the very near future, the Investment Certificate could be revoked.
- [53] ACDL's board actively monitored these events. It met on a regular basis in the first half of 2009 to consider the progress of the equity raise. On several occasions, representatives of Moelis were invited to attend the board's meetings to provide an update on their financing efforts. At each of these meetings, the board reviewed ACDL's monthly financial statements and operating budget, including the projected future cash flow with Mr. Shoemaker, and the board was briefed on the increasing pressure to show progress at the site.
- [54] To address these concerns, ACDL, through HTP, entered into an agreement with a local Vietnamese construction company in June 2009 for the construction of the piles for Phase 1 of the Project. The cost of the pilings was estimated to be \$4.5 million, which was required to be paid no later than November 15, 2009, later extended to December 31, 2009.

J. Harbinger Forbearance

- [55] As noted above, Harbinger had provided forbearance to ACDL in relation to various defaults under the 2007 Transaction Documents following July 2007.
- [56] In mid-March, ACDL approached Harbinger for a further forbearance, as the most recent forbearance was set to expire on March 31, 2009. ACDL requested that Harbinger extend its forbearance to December 31, 2009.
- [57] Counsel for Harbinger responded to ACDL's request advising that the form of the forbearance letter was acceptable, but that there might be a "business ask" if a forbearance was granted. The following day, counsel advised that Harbinger was willing to grant a forbearance but only to October 31, 2009 rather than December 31, 2009 as requested, and that future extensions as necessary would be addressed based on the progress of the equity raise and the state of negotiations as October 31, 2009 approached.
- [58] Joseph Cleverdon, the Vice President of Investments for Harbinger Capital Partners LLC, was the individual primarily responsible for Harbinger's investment in ACDL. It was his evidence that he had not determined at that time whether Harbinger would continue to forbear from exercising its contractual rights and that protecting Harbinger's investment might require it to act on ACDL's defaults and attempt to recover its investment through bankruptcy and restructuring proceedings.
- [59] ACDL was also concerned with the possibility that Harbinger might not continue to grant forbearances. Stephen Shoemaker, ACDL's Chief Financial Officer and President, stated that his view was that there was a substantial risk that Harbinger would move forward and execute because they could have attempted to sell the licence or flip the asset out to someone else after exercising their right. Robert Wolfe, an independent member of the ACDL board of directors at the material time, and Michael Aymong, then Chairman of the Board, expressed similar concerns.

K. The October 2009 Loan

- [60] By late July 2009, ACDL faced two significant problems; the need for further forbearance from Harbinger and an urgent need for additional financing. By late July 2009, it was becoming increasingly apparent that ACDL's equity raising process would not be completed by October 31, 2009, the date that the most recent forbearance agreement with Harbinger was set to expire.
- [61] Up to that point, ACDL's financial advisors had contacted over 80 potential investors and had entered into non-disclosure agreements with five of those parties. However, ACDL's searches had not identified a committed investor. Based on their experience, ACDL's financial advisors believed that it was unlikely that ACDL would receive a term sheet from any of the potential investors for several weeks. Moreover, even if an investor was identified, it would take a number of additional weeks to negotiate the financial terms of a deal and to close a

formal transaction.

- [62] In response to its dwindling cash, ACDL cut expenditures including instituting significant salary deferrals for senior management. These measures, however, were not sufficient and ACDL's internal budget showed that it would be out of cash by the middle of October and not able to meet its current obligations including payroll.
- [63] ACDL approached Harbinger to request consideration for bridge financing to give the company room to complete the project equity financing. Mr. Cleverdon reported to Phillip Falcone, the Chief Executive Officer of Harbinger, with respect to this request by e-mail dated July 20, 2009. The e-mail concludes with Mr. Cleverdon's recommendation:

In my view, if you're at all inclined to provide a bridge, I'd recommend doing it as part of a deal to provide (i) redeemable high-interest bridge financing to ACDL to get them through to the project launch, (ii) permanent capital to ACDL that would dilute other equity holders at a very low valuation and (iii) a commitment to provide a nominal amount of the project equity financing on the same terms and conditions as outside investors.

- [64] In response to ACDL's inquiries, Harbinger indicated that it was "inclined" to provide the interim funding. On September 25, 2009, Mr. Cleverdon delivered a proposed term sheet to ACDL. Under this term sheet, Harbinger proposed to advance \$3 million to ACDL by way of loan, with interest accruing at 20%, calculated monthly with principal and interest payable at maturity three years from issuance. In addition, ACDL would issue to Harbinger a penny warrant to purchase Series II Special shares which would be exercisable for 10 years (the "Warrant"). The number of shares subject to the Warrant would be equal to 5% (the "Percentage Entitlement") of the fully-diluted equity of ACDL as at the date of the Warrant. In the event that the full amount of the loan was not repaid within one year of advance, the Percentage Entitlement would increase to 25%.
- [65] Mr. Shoemaker consulted with ACDL's financial advisors at Moelis with respect to the proposal, noting that the Warrant was "punitive in terms of dilution". ACDL sought to negotiate more favourable terms. During the same timeframe, ACDL approached Harbinger seeking to extend the forbearance to January 31, 2009.
- [66] Shortly after receiving the term sheet from Harbinger, ACDL's management identified another complication with the proposed Warrant. ACDL observed that the requested Warrant, if exercised, could arguably trigger the Price Protection Clause in the Bessemer Subscription Agreement. If the clause was applicable, ACDL would be required to issue more shares in connection with the Warrant, and the proposed loan would be even more expensive and would further dilute other shareholders.
- [67] As a result, Mr. Aymong organized a call with Mr. Lester on October 8, 2009. During the call, Mr. Aymong advised Mr. Lester of ACDL's urgent need to secure interim funding to complete the equity financing process, and Mr. Aymong informed Mr. Lester of the price protection issue. To resolve the issue, ACDL requested that Bessemer either participate in the loan or

waive its rights under the Price Protection Clause. John Legge, ACDL's then chief legal officer, specifically followed up with Bessemer in an e-mail on October 10, 2009, and enclosed the term sheet that ACDL proposed to send to Harbinger.

- [68] Bessemer responded to ACDL on October 4, 2009. During a call with Mr. Shoemaker, Mr. Lester advised that Bessemer was not prepared to waive its price-protection rights, but was prepared to participate in "half the deal" i.e., Bessemer and Harbinger would each loan \$1.5 million on the same terms as set out in the Harbinger proposal.
- [69] The following day, Mr. Legge delivered a revised term sheet to Mr. Lester reflecting the proposed 50:50 split that was discussed on the call. The material terms were as follows:
- (a) Harbinger and Bessemer would advance to ACDL, in equal amounts, up to \$3 million by way of loan. ACDL would be entitled to draw down on the loan at any time after closing. The minimum draw down amount would be \$500,000 (the "Minimum Draw Down Amount"). Interest would accrue at 20% per annum;
 - (b) ACDL's existing security agreement with Harbinger would be amended so that Harbinger's loan would be secured, and ACDL would enter into a new security agreement with Bessemer; and
 - (c) ACDL would issue to each of Harbinger and Bessemer a warrant to purchase Series II Special shares (Harbinger) and common shares (Bessemer) for nominal consideration which would be exercisable for five years. The number of shares subject to the warrant would be equal to 0.25% for each of Harbinger and Bessemer for each Minimum Draw Down Amount advanced by them of the fully-diluted equity of ACDL as at the date of issue of the warrants. In the event that the loan was not repaid within one year, the Percentage Entitlement would increase from 0.25% for each Minimum Draw Down Amount advanced to 2%.
- [70] Shortly after sending the proposed term sheet to Bessemer, Mr. Legge e-mailed Mr. Cleverdon to advise him of the issues raised by Harbinger's request for the Warrant, and explained that ACDL had asked Bessemer to waive its price protection rights, but that Bessemer had declined to do so, preferring to participate in "half the deal". Mr. Legge concluded by stating that he assumed that Harbinger would have "no difficulty" participating with Bessemer in the manner suggested. Mr. Aymong later followed up with Mr. Cleverdon, encouraging him to do the deal with Bessemer.
- [71] Mr. Cleverdon responded with some reluctance, raising questions with respect to the mechanics of Bessemer's Price Protection clause and expressing concern that Bessemer was seeking to participate on a 50/50 basis rather than pro rata.
- [72] On October 21, 2009, Mr. Lester forwarded Bessemer's revisions to the draft term sheet to ACDL. In particular, Bessemer sought to have the note secured by a "senior lien" over ACDL's assets, effectively giving Bessemer access to Harbinger's existing security.

[73] The terms proposed by Bessemer were not acceptable to Harbinger. It was not prepared to share its security over the assets of the company. Mr. Cleverdon deposed the following concerning his thought process at the time:

After considering the implications of the different structures discussed, I concluded that it not in Harbinger's best interests as a shareholder to agree to a transaction pursuant to which Harbinger would share security over ACDL's assets, be diluted by Bessemer's presence in a senior loan in the Company's capital structure, and have to share decision making with Bessemer regarding the new loan. ACDL had already been in repeated default under the terms of the 2007 Transaction Documents and in my view there was a substantial possibility that Harbinger would need to realize upon its security if the Company failed to obtain Project financing again. A 50/50 split with Bessemer would introduce uncertainty as to the decision making under the loan and the outcome of any insolvency proceeding. Given the situation then facing the Company, that it faced imminent insolvency and was possibly already insolvent, reducing and complicating Harbinger's rights would damage Harbinger's interests and those of its investors.

[74] By e-mail dated October 22, 2009, Mr. Cleverdon advised ACDL that:

Thank you John--I'm doing a call with counsel tomorrow morning to discuss and should be back to you thereafter with a response. Given the complication of the down round clause in the Bessemer subscription agreement, I'm inclined to forego the warrant. However, given the venture/speculative nature of a new money investment at this stage i.e. prior to having project financing locked up, we'll still need to provide for a commensurate return. Will circle back tomorrow.

[75] By e-mail dated October 26, 2009, Mr. Cleverdon recommended to Mr. Falcone that Harbinger proceed with the no warrant high redemption price loan and grant the forbearance. The e-mail stated in part:

Abandon the warrant concept in favor of a straight loan with high redemption price or a deep OLD. To avoid the need for Bessemer's consent but still provide us a return commensurate with the risk, I think it makes sense to abandon the warrant concept and instead propose a loan with either a high redemption price (thinking minimum 2x investment amount and increasing 0.5-ix per year after the first year or two) or a deep OLD (thinking purchase price of 15-20% of face) on a 5 year loan. Over five years this would provide us a 30-40% IRR.

...

Tie forbearance to new loan to justify higher rate of return. Obviously it makes sense to grant the request, but I think it would be prudent to tie the forbearance to the new loan discussed in A above in order to give the board cover that a high rate of return is justified; will be easier for them from a fiduciary perspective if we're both providing new capital and granting the request in exchange for the rate of return, rather than just providing new capital.

[76] On October 27, 2009, Mr. Legge followed up on his earlier request for Harbinger to agree to a further forbearance.

[77] The ACDL board of directors were briefed with respect to the situation at the meeting on October 28, 2009. The minutes record:

INTERIM LOAN FROM HARBINGER

As indicated by Mr. Shoemaker the Corporation requires additional monies to cover operating and development costs.

John Legge reminded the Board:

- (a) That Harbinger's forbearance agreement expires on October 31, 2009;
- (b) As to the various consequences of failing to satisfy the various conditions under the Corporation's agreements with Harbinger; and
- (c) Historically Harbinger has been prepared to provided additional forbearance agreements but there is no guarantee that they will do so indefinitely

Messrs. Shoemaker and Aymong are going to approach Harbinger for additional funding and request a further forbearance agreement.

[78] By e-mail dated October 28, 2009, Mr. Cleverdon responded to ACDL advising that Harbinger would agree to forbear simultaneous with providing the loan.

[79] The following day, ACDL received a revised term sheet from Harbinger that eliminated the Warrant. The loan proposed a \$3 million advance with no minimum advances. The Transaction Premium, essentially the interest rate, ranged from 1.5 times principal, if repaid on the second anniversary, to 5.41 times principal, if repaid on the fifth anniversary. In his covering e-mail, Mr. Cleverdon stated that in exchange for the forbearance and the new funding, Harbinger would need a higher rate of return that was "appropriate for forbearance transactions and speculative investments of this kind".

[80] Pursuant to this proposal, Mr. Cleverdon also sent ACDL a revised forbearance letter that Harbinger would sign in conjunction with the completion of the interim loan.

[81] By e-mail dated October 30, 2009, Mr. Cleverdon confirmed that Harbinger would fund the loan on an exclusive basis in a single combined transaction with the forbearance expressly contingent upon the funding.

[82] ACDL sought to secure better terms from Harbinger. Revised term sheets were exchanged on November 4 and 9, 2009. ACDL did not, however, go back to Bessemer. The petitioners contend that management was negligent in failing to do so.

[83] On November 22, 2009, ACDL convened a meeting of the board to consider the proposed transaction, particularly in light of ACDL's need for cash to maintain operations as a going concern. At this meeting, ACDL's management recommended to the board that ACDL accept the interim funding from Harbinger based on the November 9 term sheet. The revised terms were as follows:

- (a) the loan would be due five years after the closing date;
- (b) if the loan was repaid on maturity, the transaction premium would be 4.875 times the principal (i.e., \$14.625 million);
- (c) the earliest the loan could be repaid was two years after the closing date. If the loan was repaid on this date the transaction premium would be 1.25 times the principal (i.e., \$3.75 million);
- (d) the loan would be secured by a general security agreement over all of ACDL's assets; and
- (e) Harbinger would agree to a further forbearance of its rights under various existing agreements with ACDL until January 31, 2010.

[84] ACDL's board of directors approved the terms of the proposed transaction at a meeting held November 22, 2009. The minutes record:

Management is recommending that the Corporation proceed with the loan on the basis of the conditions set out in the revised Term Sheet for the following reasons:

- (a) While the proposed interest rate is very high it is likely that the Corporation is better off with a higher interest rate rather than the 5% Penny Warrant (which would be highly dilutive):
and
- (b) The Corporation needs a further forbearance from Harbinger or it will be in default of the Shareholders Agreement. If this occurs then Harbinger is in a position to demand repayment of \$25 million (plus interest).

Based on the above information, the Board authorized Management to enter into the loan agreement with Harbinger on the above terms.

L. Discussions after the Bridge Loan

[85] In November 2009, Mr. Legge advised Mr. Lester that Harbinger had taken care of the loan and that it had been done without the issue of warrants. There was no further discussion about the terms. The documentation was placed on the ACDL website and was available for review by Southpaw and Bessemer although it appears that the documents might not have been reviewed by Southpaw or Bessemer management at any relevant times.

[86] Mr. Lester deposed that he advised Mr. Aymong in the fall of 2009 that Bessemer would be interested in investing a further \$5 million as part of the equity raise. He then advised Mr. Aymong that he would require board approval for this. He deposed that this was not the case, that he made the statement that he required board approval to provide him with an excuse not to go forward if other investors were not stepping up.

[87] The next event was a conference call involving Messrs. Lester, Aymong and Shoemaker. Mr. Lester made no reference to the call in his first affidavit. Mr. Aymong deposed that:

I recall participating in a conference call with Lester and Stephen Shoemaker several days later in which Lester advised us that the Bessemer investment committee had rejected his proposal. I believe Lester used the words "hell no" to describe the reaction of the Bessemer investment committee. Lester stated that the investment committee questioned why Bessemer had made the initial investment in ACDL in the first place, given that Bessemer usually invested in publicly traded companies and that ACDL was an unusual investment that carried significant risk. As a result, Lester told me at that time that Bessemer was not prepared to make any additional investment in ACDL at any amount.

[88] Mr. Shoemaker's evidence was to the same effect. He deposed:

A conference call with Lester was held on December 16, 2009. Lester advised ACDL on the call that he had taken his proposal to Bessemer's board of directors for approval but that the request had been flatly rejected. I recall this discussion vividly. Lester stated that his request was met with a "hell no" from the Bessemer board of directors. In fact, Lester told us that the board of directors wanted to know why he had made the initial investment in ACDL to begin with.

[89] Mr. Lester then swore affidavit #3 in which he stated the following with respect to his now refreshed recollection concerning this conversation:

On December 14, 2009, I sent an email to Messrs. Aymong and Shoemaker (attached as Exhibit 20 to my first affidavit) stating that I wanted to update them on my discussions with my "Board of Directors". In fact, I did not have any such discussions with a board, nor was I obliged to seek approval from anyone to make a loan or a further equity investment in the company.

I now recall the telephone discussion with Messrs Aymong and Shoemaker on December 16, 2009 as follows. I believe that I told Messrs Aymong and Shoemaker that I had met with my board and that they were negative about the investment and that they were not prepared to participate in the equity raise. I may well have said that my board was questioning why the investment had been made in the first place. I did not say that the board's reaction to a further equity investment was "hell no" or that it would not do so under any circumstances.

[90] ACDL took Mr. Lester's statements at face value and concluded that Bessemer's board was directly involved in the matter and that the board had rejected any further investment in the company in whatever form.

- [91] ACDL also sought additional investment from Southpaw. However, these overtures were rejected. ACDL was told that Southpaw was not prepared to invest anything further beyond a "token". ACDL's management concluded that Southpaw was not prepared to make further investment of any form.

M. January 2010 Loan

- [92] In late December 2009, ACDL retained a new financial advisor, PacBridge Partners (HK) Limited ("PacBridge"), to represent ACDL in its efforts to raise the equity necessary to finance Phase 1 of the Project. ACDL retained PacBridge in light of its extensive experience in Asia, as well the fact that PacBridge was optimistic that it could find investors who would be interested in a preferred equity type of financing.
- [93] However, in late 2009 and early 2010, ACDL experienced a number of negative developments in Vietnam, each of which put the future of the Project in further jeopardy.
- [94] ACDL had also recently received a notice from the BRVT tax department that HTP was required to repay an approximately \$2.2 million value added tax ("VAT") refund that HTP had earlier received, plus a penalty of 10%. Neither ACDL, nor HTP, had the funds to repay these amounts. The tax authorities demanded payment by December 28, 2009 and the amount was required to be repaid immediately under the laws of Vietnam.
- [95] In light of these negative developments, ACDL's management determined in early 2010 that the funds that had been advanced to ACDL under the October 2009 Loan would not be sufficient to cover ACDL through to the completion of the equity financing. ACDL's management further concluded that without a further infusion of cash, ACDL would likely run out of money again and be rendered insolvent. Under the circumstances, ACDL's management decided to approach Harbinger to ascertain whether it would be willing to provide additional interim financing.
- [96] Accordingly, ACDL initiated contact with Harbinger in early January. Several days later, Harbinger advised that it was prepared to advance additional interim financing of \$12.5 million by way of a loan to bridge ACDL until it could complete the equity financing. In addition, Harbinger would agree to a further forbearance of its rights under its various agreements with ACDL until May 31, 2010, later extended, on the condition that ACDL issue a warrant in favour of Harbinger to purchase that number of common shares of ACDL which represented 29% of the fully-diluted equity as at that time.
- [97] While ACDL did canvass without success other possible sources for an interim loan, it did not approach either Southpaw or Bessemer with this request. The petitioners assert that this omission was negligent on the part of ACDL's management.
- [98] The Harbinger proposal was presented to the ACDL board at a meeting held on January 21, 2010. The minutes record:

4. INTERIM LOAN AGREEMENT WITH HARBINGER CAPITAL PARTNERS

The Board was advised that the:

- (a) Corporation has a financial obligation to its piling contractor in Vietnam, which had to be paid by January 31, 2010, and that should this not occur there was a risk of very significant adverse consequences. The amount outstanding to the contractor was approximately 13.8 million;
- (b) Corporation needed monies to continue with its financing efforts and to close the financing;
- (c) Corporation's largest shareholder, Harbinger Capital Partners ("Harbinger"), was prepared in loan the Corporation 12.5 million, on terms that were outlined;
- (d) This loan would be sufficient to satisfy the Corporation's outstanding short term obligations and allow the Corporation to continue with its financing efforts;
- (e) In the circumstances, it was highly unlikely that the Corporation could obtain interim funding from an entity other than Harbinger; and
- (f) The proposal from Harbinger was the only viable alternative in the circumstances;

Bob Wolfe moved that management use its best efforts to negotiate an agreement with Harbinger for the interim loan along the terms outlined to the Board and that it is entitled to execute the agreement David Tsubouchi seconded the motion. Motion carried.

[99] After further discussions and negotiations, ACDL entered into two binding term sheets (the "January Term Sheets") with Harbinger, through two of its subsidiaries, Harbinger Master Fund and Harbinger Situation Fund (together, the "Harbinger Funds"), on January 28, 2010. Pursuant to the financing term sheet (the "January Financing Term Sheet"), Harbinger agreed to advance the sum of \$12.5 million to ACDL by way of loan on the following terms:

- (a) Harbinger would advance \$12.5 million to ACDL on closing. The loan would be due eight years after the closing;
- (b) ACDL would enter into an employment agreement with a new chief executive officer acceptable to Harbinger and reduce annual overhead expenses by \$1 million per year by March 15, 2010 (together, the "Inside Date Conditions");
- (c) ACDL would need to consummate equity and debt financing sufficient to fund 100% of the development, construction and pre-opening costs and working capital requirements for Phase 1 of the Project and obtain the necessary amendments to the Investment Certificate to provide for the delayed Charter Capital contributions and construction schedule by June 30, 2010 (together, the "Outside Date Conditions");

- (d) the Transaction Premium, which is essentially interest, at maturity would be 41.735 times the principal. However, if the Inside Date Conditions were met by ACDL, the Transaction Premium at maturity would be reduced to 24.629. If both the Inside Date Conditions and Outside Date Conditions were met by ACDL, the Transaction Premium at maturity would set to 7.157;
- (e) the loan could be repaid prior to maturity starting with the fifth anniversary. If repaid on the fifth anniversary, the Transaction Premium would be 2.713 times the principal. If repaid on the sixth anniversary, the Transaction Premium would be 3.827 times the principal. If repaid on the seventh anniversary, the Transaction Premium would be 5.275 times the principal;
- (f) if the Outside Date Conditions were met, but the inside Conditions were not met, the loan terms would automatically be modified so that the January Transaction Premium at maturity would set to 18.541 and the loan would be repurchasable prior to maturity upon the seventh anniversary at a Transaction Premium of 12.476; and
- (g) the loan would be secured by a general security agreement over all of ACDL's assets.

[100] Because of the urgent need to pay the piling contractor, ACDL secured a further obligation from Harbinger to advance \$5 million to ACDL immediately, prior to the execution of definitive documentation, with the balance advanced upon closing.

[101] Concurrently with the January Financing Forbearance Sheet, ACDL also entered into a binding forbearance term sheet (the "January Financing Forbearance Term Sheet") with Harbinger and the Principal Shareholders pursuant to which Harbinger agreed to forbear from exercising its rights as a result of certain existing and impending defaults under the 2007 Shareholders' Agreement until June 30, 2010. In consideration for this forbearance, the parties agreed that ACDL would execute and place into escrow an undated warrant in favour of Harbinger to purchase that number of common shares of ACDL which represented 29% of the fully-diluted equity as of January 27, 2010. The strike price of the warrant was set at \$40 per share. The January Forbearance Term Sheet provided that if Phase 1 of the Project was completed and if ACDL completed a financing or series of financings in which a minimum of \$60 million of equity proceeds was received by ACDL, the strike price would automatically change to \$0.01 per share on the earlier of two specified dates. The January Forbearance Term Sheet also provided that if ACDL did not complete the financing within three years, the warrant would be cancelled and nullified.

[102] Harbinger advanced \$5 million to ACDL on January 29, 2010. The parties subsequently finalized the terms of the bridge financing loan agreement (the "January Loan Agreement") and forbearance agreement (the "January Forbearance Agreement") in April 2010, effective January 29, 2010 (collectively as the "January 2010 Loan"). The January Loan Agreement incorporated the binding terms of the January Financing Term Sheet, including the Inside Date and Outside Date Conditions, as well as adding certain other conditions. Included among those other conditions was the appointment of Mr. Wolfe as Chairman of the Board. The January Forbearance Agreement incorporated the binding terms of the January

Forbearance Term Sheet.

N. Spring 2010 - Restructuring

- [103] ACDL recognized that Harbinger's equity and debt interests in the Company would likely need to be restructured. Shortly before the term sheets were finalized, PacBridge, ACDL's financial advisor, had expressed concern that the terms might negatively impact the Company's equity raising efforts. PacBridge repeated these concerns in early February with even greater force. Accordingly, PacBridge encouraged ACDL to meet with Harbinger to confirm that it would be amenable to a restructuring. ACDL's management shared similar concerns.
- [104] As a result, ACDL approached Harbinger on several occasions in the spring of 2010 to request that it restructure the October 2009 Loan and the January 2010 Loan and Harbinger's other interests. Mr. Cleverdon advised ACDL that Harbinger would be prepared to do so, but only as part of the equity being raised for the Project financing and only after a new CEO of ACDL had been appointed.
- [105] By early March 2010, almost two years had passed since ACDL had been granted the Investment Certificate. However, despite its efforts, ACDL had still not been able to raise the required equity. Aside from the piling work that had been commenced in mid-2009, very little construction was taking place on the Project site. The \$2.2 million VAT refund was due to be repaid.
- [106] Given these developments, ACDL determined that it was imperative for ACDL to take steps to improve the situation. Accordingly, ACDL approached Harbinger to request a second early advance of monies in the amount of \$2.5 million under the January 2010 Loan to repay the VAT refund. With the benefit of these funds, ACDL repaid the VAT refund in early April 2010.
- [107] During May and June 2010, PacBridge contacted over 60 institutional and high net worth investors. PacBridge convened road shows in London, Hong Kong, Singapore and New York, coupled with a series of on-site diligence and site visit meetings with various financial and strategic investors.
- [108] While the search for equity investors continued, ACDL was receiving considerable pressure to complete the equity financing by July 31, 2010. In particular, ACDL was subject to the following developments:
- (a) BIDV had repeatedly advised ACDL and its advisors that it would withdraw its commitment to advance the debt financing if ACDL did not raise the \$125 million in equity financing by July 31, 2010.

- (b) ACDL's Vietnamese advisors had repeatedly advised ACDL that there was a significant likelihood that ACDL would lose the Investment Certificate if the remaining \$50 million Charter Capital contribution was not deposited by July 31, 2010.
- (c) ACDL was required under various agreements with Harbinger to satisfy the Mandatory Conversion condition by June 30, 2010, failing which ACDL would be in default under those agreements.
- (d) ACDL was once again close to reaching the point where its outstanding obligations would exceed its cash liquidity.

[109] In light of these developments, ACDL's management determined that it was imperative for ACDL to close a financing to develop Phase 1 of the Project by the deadline of July 31, 2010.

[110] Harbinger was conscious of the need to restructure the debt in order to complete the equity raise. On April 10, 2010, Mr. Cleverdon sent an e-mail to Mr. Falcone providing him with an update. In respect of the equity raise process, he said this:

Also, it was my view that, given the straightjacket we placed on the company in the last couple of financings, Harbinger would need to restructure to some degree our preferred stock and debt positions in the company to help attract third party equity. I've been giving some thought to how this ought to look and will send you my views when I have specifics worked out. Needless to say, it will need to be a good trade for Harbinger, it will need to further dilute existing equity holders, and we may want to consider retaining a fixed claim of some sort to maintain seniority over the other existing equity or new equity.

[111] Mr. Cleverdon followed up with further e-mail exchanges with Mr. Falcone on May 13 and May 19, 2010 which emphasized the need for restructuring to "clear a path for third party financing". Mr. Cleverdon indicated that he was working out a plan for restructuring that would improve Harbinger's position.

[112] By June 2010, ACDL had received non-binding term sheets from potential investors. Potential investors had urged ACDL to pursue a restructuring of Harbinger's interests. ACDL's financial advisors had continued to emphasize that without restructuring, the Harbinger loans were an impediment to attracting investors. ACDL approached Harbinger and entered discussions with respect to the terms of a potential restructuring.

[113] On June 22, 2010, Harbinger provided a term sheet proposal for the restructuring of its debt and equity interests. The term sheet contemplated that certain of Harbinger's interests in ACDL would be consolidated into a new series of preferred equity shares (the "Series III Special Shares"). As part of Harbinger's proposal, ACDL's cash balance would be increased by \$2.5 million of cash in order to permit the Company to continue to fund operations. Harbinger's proposal did not contemplate a renegotiation of the monies advanced under the January 2010 Loan.

[114] Harbinger's proposal was presented to the ACDL board of directors at a meeting on June 30, 2010. Brian McCullough and Jeremy Choy from PacBridge discussed the proposal and expressed the view that the proposal as outlined was reasonable. They did not believe that it would interfere with the company's ability to market a preferred share offering. ACDL management recommended that it be instructed to move forward with the proposal and the board directed management to do so.

[115] A further meeting of the board of ACDL was held on July 4, 2010. The board was informed that the Prime Minister of Vietnam had confirmed that the project had the full support of the government so long as the corporation funded the equity required to develop the MGM Grand Ho Tram by July 31 and continued construction on the site. Two major investors had expressed an interest in the Project. However, the board was further advised that neither would be in a position to close by July 31. The minutes record:

Given that it is now July 5th it seems highly unlikely that the Corporation can negotiate and close an equity financing with the potential investors other than Harbinger by July 31st. However, Management continues to explore every avenue and possibility of raising the required equity.

9. HARBINGER'S POSITION

Management has advised Harbinger that the Corporation has agreed to the renegotiation of their existing investments into a new preferred equity (the "Harbinger Transactions"). Outside counsel for both parties are working on the necessary documentation.

Management has also advised Harbinger that:

- (a) given _____ position (i.e., they need 2 to 3 months to close) we are not in a position to close the ... financing by July 31st; and
- (b) we will be sending them a request to provide the terms on which Harbinger would fund the \$150M;

Mr. Cleverdon was non-committal on the funding of the equity. Management will attempt to determine as quickly as possible if Harbinger is prepared to fund the required equity and if so, on what terms.

11. MOVING FORWARD

Management is recommending to the Board that the Corporation send a written request to Harbinger:

- (a) asking them to confirm that they will fund the \$150M in equity by July 31st and the terms on which they would be prepared to do so; and

- (b) confirming that it will allow the Corporation to continue to pursue the other investors and either bring them into the July 31 closing or sell down to them after that financing closes. The hope is that if the Corporation could close one of the other deals in the next few months then it could preserve more of the existing equity than if Harbinger is to fund on its own.

Management sees no alternative to making this request at this time. If the Corporation delays pursuing a Harbinger funded equity investment there is a significant risk that the Corporation will not close by July 31st and that this will very likely result in the Corporation losing the Investment Certificate.

- [116] On July 12, 2010, following further negotiations between Harbinger and ACDL, Harbinger presented ACDL with a revised proposal for the restructuring of its debt and equity interests. Under the revised proposal, Harbinger would effectuate two separate transactions: Harbinger would purchase new preferred equity in the form of Series III Special Shares, and separately, Harbinger would sell to ACDL all of Harbinger's debt and fixed claim instruments in ACDL, including the monies advanced to ACDL under the January 2010 Loan, and the Initial Harbinger Warrant.
- [117] Harbinger's proposal was presented to the ACDL board at a meeting on July 13, 2010. ACDL management recommended that the board approve the restructuring proposal. The board accepted this recommendation.
- [118] ACDL and Harbinger entered into a series of concurrent transactions on July 13, 2010 (the "July Restructuring") to effect the issuance of the new Series III Special Shares, including the entering into of a further subscription agreement (the "Sixth Harbinger Subscription Agreement") and a purchase agreement (the "July Purchase Agreement"). Pursuant to the Sixth Harbinger Subscription Agreement, Harbinger acquired 588,615 newly created Series III Special Shares at \$100 per share for aggregate gross proceeds of \$58,861,500. The parties agreed that \$3.5 million of the proceeds received from Harbinger in the Sixth Harbinger Subscription Agreement would be used to fund ACDL's emergency cash flow needs, including payment of employee salaries. Using the remainder of the proceeds received from Harbinger, ACDL agreed to repurchase Harbinger's 250,000 Series I Shares, Harbinger's initial warrant, Harbinger's interest in the \$3 million loan from the October 2009 Loan and Harbinger's interest in the \$12.5 million loan from the January 2010 Loan.
- [119] Pursuant to these transactions, ACDL repurchased Harbinger's interest in the October 2009 Loan for \$3,895,890 equivalent to a transaction premium of 0.3 times the principal and Harbinger's interest in the January 2010 Loan for \$15,060,110 equivalent to a transaction premium of 0.2 times the principal. ACDL's actual interest payments in respect of these loans were now approximately 20% to 30%, or roughly within the same order of magnitude as the original Bessemer proposal in connection with the October 2009 Loan.

- [120] Finally, as part of these transactions, ACDL cancelled the Series I Shares and the warrants. Pursuant to the July Purchase Agreement, Harbinger released HTP from its obligations under the Capital Mortgage and the Put Option Agreement with a view to facilitating anticipated financing with BIDV.

O. July 2010 Transaction

- [121] ACDL had continued efforts to complete the equity financing process. However, by mid-July it became clear that the investors who had signalled an interest were not in a position to close prior to July 31, 2010. Management advised the board at a meeting held on July 22, 2010 that the interested investors were not in a position to close by the deadline and that Harbinger's proposed investment continued to be the only available option for the company to satisfy the funding requirements by the deadline. Management advised that "there is no other source for these funds". The board was instructed that Harbinger was prepared to provide the necessary Charter Capital (\$50 million) by way of a loan coupled with warrants for the purchase of common shares. The board instructed management to proceed with the proposed transaction.
- [122] On July 23, 2010, ACDL provided an update to Southpaw's U.S. counsel, Mr. Brett Lawrence on the equity raise and the approaching deadline in Vietnam. ACDL reported that it was negotiating an equity transaction with Harbinger, and that Harbinger was seeking a warrant that would carry significant dilution (up to 95%). Mr. Lawrence undertook to update Bessemer as well. ACDL advised that it would be a few days before the transaction was finalized. However, given their past rejections of ACDL's solicitations, ACDL did not expect that either Bessemer or Southpaw would seek to participate in the transaction. Bessemer and Southpaw did not express any interest in providing the required equity financing, or in acquiring Harbinger's positions.
- [123] ACDL proceeded to negotiate the terms of a transaction with Harbinger over the latter half of July which contemplated that Harbinger would advance the sum of \$50 million upon closing and a deferred amount of \$75 million in later instalments. The parties exchanged proposals, and after some improvements, Harbinger put forward a revised "take it or leave it" offer on July 25, 2010. Harbinger's revised proposal contemplated a \$125 million loan, with \$50 million being advanced to ACDL immediately to satisfy the Charter Capital contribution. The interest on the loan would be calculated at 7.5% per quarter compounded quarterly, and the rate would increase to 8.75% per quarter upon the occurrence of an event of default. In consideration for making the new financing available, ACDL would issue warrants to Harbinger to purchase 250 million common shares of ACDL at \$0.01 per share exercisable for 20 years.

- [124] Effective on July 27, 2010, ACDL entered into a loan agreement (the "July Loan Agreement") with Blue Line, Breakaway ACDL and Harbinger whereupon Harbinger agreed to provide the sum of \$125 million in financing to the Company on the terms described above. In consideration for entering the financing commitments under the July Loan Agreement, ACDL issued Harbinger certain warrants for the purchase of 250 million common shares of the Company at \$0.01 per share exercisable for 20 years.
- [125] Upon execution of the July Loan Agreement, the \$50 million advanced to ACDL was immediately deposited into HTP's charter capital account to satisfy the Charter Capital contribution. As a result, ACDL was able to maintain its Investment Certificate. After receipt of the funds, ACDL was able to commence full-scale construction at the site.
- [126] On or about May 26, 2011, Harbinger exercised its warrants. ACDL had no participation in this decision. All shareholders of ACDL were significantly diluted through the exercise of the warrants. Prior to the October 2009 Loan, the petitioners held approximately 8.4% of the fully diluted equity. After the exercise of the warrants, the petitioners' share was reduced to .4% of the company.
- [127] On May 26, 2011, ACDL was able to secure an additional equity investor for the Project. The investor entered into a subscription agreement with ACDL to acquire a 26% interest for a \$95 million investment. It further agreed to enter into a management agreement through 2058 for the second resort of the project.

IV. Legal Principles

[128] The petitioners seek relief pursuant to s. 241 of the CBCA which provides:

241. (1) A complainant may apply to a court for an order under this section.
- (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
- (a) any act or omission of the corporation or any of its affiliates effects a result,
 - (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
 - (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[129] The legal principles to be applied in relation to a claim of oppression were described in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69. The duties of directors of a corporation were described by the Court at para. 36:

The directors are responsible for the governance of the corporation. In the performance of this role, the directors are subject to two duties: a fiduciary duty to the corporation under s. 122(1)(a) (the fiduciary duty); and a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances under s. 122(1)(b) (the duty of care).

[130] In the present case the petitioners allege a breach of the duty of care of the officers and directors of ACDL.

[131] The court described the "business judgment rule" at para. 40:

In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.); *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44. It reflects the reality that directors, who are mandated under s. 102(1) of the CBCA to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

[132] The petitioners submit, however, that this case does not engage the business judgment rule because the conduct at issue was a failure to meet the standard of care, in particular, a failure to explore the appropriate alternatives before reaching a business decision.

[133] The court noted at paras. 58 and 59 that oppression is an equitable remedy. The focus of the court should be at business realities not narrow legalities. The inquiry must be contextual and fact specific.

[134] In considering an oppression claim, the court is to first consider whether there has been a breach of reasonable expectations. In this regard, the Court noted at para. 62:

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

[135] The Court continued at paras. 70 and 72:

At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held

the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.

....

Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[136] The next question to be addressed is whether the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest. In relation to this inquiry, the Court stated at paras. 89 and 91:

Thus far we have discussed how a claimant establishes the first element of an action for oppression -- a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the CBCA. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the CBCA. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of Ebrahimi.

...

The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the CBCA is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.

[137] Finally, the Court emphasized that causation is a necessary element of the claims, stating at para. 90:

In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.

V. Claim Against ACDL

[138] The amended petition seeks:

1. an Order declaring that the affairs of the respondent, Asian Coast Development (Canada) Ltd. ("Asian Coast" or "the company"), are being and have been conducted, and that the powers of the directors of Asian Coast are being and have been exercised, in a manner oppressive to the shareholders of Asian Coast, including the petitioners;
2. an Order declaring that the following series of transactions:
 - (a) a Loan and Forbearance Agreement between Asian Coast and the respondent, Harbinger Capital Investments S.à.r.l., dated October 31, 2009;
 - (b) a Bridge Loan Financing Agreement between Asian Coast and the respondents, Harbinger Capital Investments S.à.r.l., Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P., dated January 29, 2010;
 - (c) a Share Subscription Agreement dated July 13, 2010 whereby Asian Coast issued 588,615 Series 111 Special Shares to Harbinger Capital Investments S.à.r.l. at a price of \$100 per share;
 - (d) a Purchase Agreement between Asian Coast and Harbinger Capital Investments S.à.r.l., Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P. dated July 13, 2010 whereby Asian Coast agreed to use approximately \$55 million of the proceeds from the Subscription Agreement dated July 13, 2010 to acquire inter alia the indebtedness under the Loan and Forbearance Agreement dated October 31, 2010 and the Bridge Loan Financing Agreement dated January 29, 2010; and
 - (e) a Loan Agreement between Asian Coast and Harbinger Capital Investments S.à.r.l., Blue Line ACDL, Inc., and Breakaway ACDL, Inc. dated July 27, 2010, part of the consideration being the issuance of warrants to purchase 250 million shares of Asian Coast at \$.01 per share exercisable for 20 years (the "Warrants");

(collectively, the "Impugned Transactions") were unfairly prejudicial to or unfairly disregarded the interests of the shareholders of Asian Coast, including the petitioners.

[139] The specific allegations are as follows:

23. Without informing Bessemer of the rationale or the terms to be agreed with Harbinger, Asian Coast entered instead into a financial arrangement with Harbinger on far more onerous terms than the joint loan proposed in the October 15, 2009 term sheet. These terms were commercially unreasonable and were not in the best interests of the company.

...

28. The terms of the January 2010 loan from Harbinger were more onerous than the October 2009 loan from Harbinger, were likewise commercially unreasonable and were not in the best interests of the company.

...

31. By entering into the October 2009 and January 2010 loan agreements with Harbinger, the directors did not act in the best interests of the company and the company acted contrary to the reasonable expectations of the petitioners. These loan arrangements significantly and adversely affected the ability of the company to obtain future financing (either debt or equity) on reasonable terms.
32. By reason of its security arrangements with the company, Harbinger was able to exercise de facto control over the company from and after October 2009 or, in the alternative, from and after January 2010, and did so in a manner which benefitted it at the expense of the company and its other shareholders. Harbinger was privy to, and assisted the company in, the impugned conduct.

[140] Although the amended petition characterizes the "Impugned Transactions" as unfairly prejudicial or made in unfair disregard of the petitioners' interests, the submissions at the hearing were different. The focus of the conduct alleged to be oppressive was not on the decision of ACDL to enter into the "Impugned Transactions", but on management's alleged failure prior to the October and January bridge financing loans to use best efforts to secure the loans on better terms.

[141] The petitioners stated their position as follows in their written submissions:

The core point is that the company should never have accepted the terms of the two loans without determining whether its other institutional investors were prepared to offer better terms. Existing investors with the capacity to lend will always consider whether to provide bridge loans as a means of protecting their existing investment. In the middle of October 2009, Bessemer had shown interest in assisting the company with bridge funding. However, when Harbinger sought interest rates in excess of 40% on a \$3 million loan late in October 2009, the company did not contact Bessemer, though it was the second largest investor in the company, to determine if Bessemer would lend on better terms. The evidence clearly supports a finding that Bessemer would have done so in order to protect its existing \$20 million investment.

Failing to contact Bessemer left the company with no bargaining leverage in its dealings with Harbinger. Allowing itself to be held hostage to Harbinger's demands in those circumstances constituted a stark failure to properly look after the company's interests. Contacting Bessemer to see if better terms could be obtained for the company was the only sensible course to follow and it failed to do so.

[142] As stated in the petitioners' reply submission:

In short, the heart of the case is no more complicated than this. Exercising reasonable care in the interests of the company and its shareholders, Shoemaker should have canvassed for bridge financing in October 2009 and January 2010. This was a breach of the obligation owed by Shoemaker to the company and was conduct inconsistent with the reasonable expectations of the shareholders. Having regard to the known implications of those loan terms, the failure to try and

improve upon them by canvassing Bessemer amounted to oppressive or unfairly prejudicial conduct.

- [143] The petitioners submit that the shareholders' reasonable expectations include an expectation that the officers and directors will fulfill their statutory obligation, in the language of s. 122(1)(b) of the CBCA, to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. In particular, it is submitted that it was their reasonable expectation that when ACDL required bridge financing in October 2009 that the company would use its best efforts to obtain a loan on the most favourable terms. Once Harbinger presented its proposal, the company was required to determine whether its other institutional lenders would have been prepared to offer better terms.
- [144] It is clear that after receiving the revised term sheet from Harbinger on October 29, 2009, the company did not approach either Bessemer or Southpaw to determine if they would lend on better terms. The petitioners submit that this failure started a chain of events that ultimately resulted in the dilution that virtually extinguished the value of their shares.
- [145] The first link in the chain of causation alleged is that if approached, Bessemer would have agreed to lend on significantly better terms; namely with no security or warrants and at a much reduced lending rate from that proposed by Harbinger.
- [146] It is then submitted that ACDL would have either agreed to the loan on those terms or would have used that offer as leverage to secure better terms from Harbinger. It was submitted that it would be unreasonable for the company to think that Harbinger would refuse to forbear if the company could get a cheaper loan from Bessemer. In that regard, the petitioners submit that Harbinger never contemplated refusing forbearance and acting on the default and that it only suggested otherwise to justify the high rate on the proposed loan.
- [147] The next link in the chain is in relation to the January 2010 Loan. While it is clear that ACDL had contacted both Southpaw and Bessemer to solicit further investment only to be rebuffed, ACDL did not specifically contact either Southpaw or Bessemer to request bridge financing in January 2010. The petitioners submit that failure to do so was negligent and a breach of their reasonable expectations that management would use best efforts to obtain bridge financing on the most favourable terms.
- [148] The petitioners submit that had Mr. Lester been told of the terms of the proposed January 2010 Loan, he would have known that the loan "would enable Harbinger to crush the equity of the existing shareholders". The petitioners submit that in the circumstances, and given the implications of the loan on the equity raise, Bessemer would have made the loan on better terms.

[149] The next step in the argument is the effect of the bridge financing on the equity raise in the early months of 2010. The petitioners submit that the terms of the October 2009 and January 2010 bridge loans created a substantial impediment to attracting investors and concluding any arrangements for an equity raise. The petitioners submit further that if those loans had been on materially better terms, the equity raise would have resulted in materially less dilution for the petitioners.

[150] The petitioners submit that given the adverse effect created by the loans without restructuring, the company was not able to secure the investors it needed to meet the deadlines. This situation enabled Harbinger to control the situation by "running out the clock" and addressing restructuring so late in the day that there was no time left to obtain equity from anyone other than Harbinger. This then permitted Harbinger to insist upon the terms that resulted in the massive dilution.

[151] The petitioners submit that had the loan terms not been so onerous, the company would have been able to secure investors within the applicable timeframe and on terms that did not result in the massive dilution of the Harbinger transaction.

A. Were the reasonable expectations of the petitioners breached?

1. October 2009

[152] The first step in the analysis is a consideration of whether the reasonable expectations of the petitioners were breached. The first allegation of breach is the failure to approach the petitioners in October 2009 to seek better terms than Harbinger was demanding. Not only was there the possibility of obtaining financing on better terms, but a Bessemer offer could have been used to leverage Harbinger. Moreover, it was clear from Mr. Shoemaker's cross-examination that using Bessemer as a means of acquiring leverage was a consideration at the time.

[153] ACDL submits that, while it may be prudent for a corporation to canvass alternative offers when possible, it is not legally necessary to do so. This is particularly so if there are particular constraints, such as time or contractual constraints, or a risk that an offer may be withdrawn, citing 820099 Ontario Inc. v. Harold E. Ballard Ltd., [1991] O.J. No. 266 (C.J.), and Maple Leaf Foods Inc. v. Schneider Corp. (1998), 42 O.R. (3d) 177 (C.A.), in support. In my view, ACDL's submission overstates the position, which is more accurately captured in another submission by ACDL that the degree of canvassing required will depend upon the circumstances.

[154] ACDL submits that in this case, the circumstances did not warrant any canvassing after October 29, 2009. It submits that ACDL did canvass Bessemer, in addition to the Vietnamese banks, prior to entering into the October 2009 Loan. It submits that once it learned of Harbinger's position in respect of Bessemer's participation, and in respect to the forbearance issue, ACDL's management exercised their professional judgment and determined that it would be in the best interest of the company to negotiate the best deal it

could with Harbinger and that this decision fell within the range of reasonableness.

- [155] Mr. Wolfe has deposed that the board concluded that it was preferable to pursue further discussions with Harbinger as opposed to Bessemer or other potential lenders for a number of business reasons that he lists. However, the minutes of the October 2009 board meeting make no reference to any such discussion and make no reference to Bessemer at all. Mr. Wolfe testified in cross-examination that he has no recollection of the meeting beyond what is in the minutes. The minutes of the November 2009 board meeting do set out a history of the effort to obtain financing that does refer to Bessemer. However, the reasons noted in the minutes for the board to instruct management to proceed with the Harbinger transaction are not the same as the reasons stated in Mr. Wolfe's affidavit.
- [156] Moreover, the evidence on this subject in his affidavit is not consistent with the evidence of Mr. Shoemaker and Mr. Aymong. Mr. Shoemaker gave evidence that the decision about whether to approach Bessemer was up to him and there was no direction from the board not to do so. Mr. Aymong testified that it was left to Mr. Shoemaker to obtain the best loan terms possible and that there was no direction that he go only to Harbinger. I have concluded that Mr. Wolfe's affidavit evidence on this issue is at best reconstruction.
- [157] In my view, ACDL should have approached at least Bessemer to see if it could secure the loan it required on better terms than Harbinger was prepared to offer. There was no downside. Nicholas Leone, an expert who was retained by ACDL and Harbinger, gave evidence that it would not be reasonable to assume that if the company had secured a loan on better terms Harbinger would not have acted on its default. A better offer from Bessemer could have been used as leverage in negotiations with Harbinger.
- [158] Both Messrs. Wolfe and Aymong gave evidence that they expected management of the company to make best efforts to obtain bridge financing and not to exclude any investors in those efforts. Mr. Leone stated that he would have advised the company to see if anyone was prepared to offer the loan on better terms, as one way of dealing more effectively with Harbinger. Moreover, he assumed that the company had approached Bessemer to see if it would be prepared to make the loan on better terms. Mr. Brandt, who provided an expert opinion on behalf of the petitioners, stated that in the event third party financing was unavailable, he would have expected the company to explore the possibility of securing financing from its existing shareholders and to see which would offer the most advantageous terms.
- [159] While I agree that the ultimate decision to negotiate with Harbinger fell within the range of reasonableness, it would be reasonable to expect management to equip themselves with as much leverage as possible to deal with the negotiation and not reasonable for management to neglect to do so. Further, it was not reasonable in these circumstances to make the decision to negotiate with Harbinger without canvassing the possibility of securing better terms from Bessemer. I find that the failure to contact Bessemer in relation to Harbinger's straight loan proposal breached the reasonable expectations of the petitioners. I find

further that this breach was unfairly prejudicial to the interests of the shareholders.

2. January 2010

[160] The second allegation is with respect to the failure to contact the petitioners and, in particular, Bessemer, when ACDL required further financing in January 2010. It is common ground that ACDL did not do so. Mr. Lester has deposed that had he known of the terms proposed by Harbinger, he would have given serious consideration to a loan in January 2010 on materially better terms than those offered by Harbinger in order to protect the fund by not discouraging potential future equity investors.

[161] ACDL management had approached Bessemer in December about making an additional investment. Mr. Lester advised Messrs. Aymong and Shoemaker that he had met with his board, that they were negative about the investment and refused to increase their investment. Mr. Lester admitted that he was lying when he told ACDL that the board was involved. He stated in cross-examination that [we] were not negative about the investment. His evidence was that he was trying to get ACDL to stop calling and used this as an excuse. In light of those refusals, ACDL did not approach either petitioner with a request for financing.

[162] Mr. Shoemaker deposed that:

Based on our conversation with Lester, and, in particular, the manner in which Bessemer's board of directors had categorically rejected Lester's request for approval to participate in equity financing, it was my belief that Bessemer was not willing (or perhaps able) to invest any further funds with ACDL. As a result, ACDL's management did not continue updating Bessemer on the status of the equity raise or ACDL's need for additional bridge financing thereafter.

[163] In addition, Southpaw had declined solicitations to increase its investment, stating that it was a small fund and not prepared to extend its initial investment.

[164] The petitioners submit that it was not reasonable for ACDL to conclude on the basis of a refusal to make an additional investment, that a request to participate in financing would have been refused. However, Mr. Lester did not just say that Bessemer was not prepared to invest further at this time; he told ACDL management in relatively strong language, that Bessemer's board was negative about the investment. He did so to make ACDL stop soliciting further funds. ACDL had no reason to conclude that he was lying. I conclude that the inference that Mr. Shoemaker drew was reasonable in the circumstances and that it was reasonable having been given that representation for him to not approach Bessemer for financing.

[165] ACDL notes that its management sought independent advice from its financial advisors who said that ACDL should take the Harbinger deal unless it could secure a better deal from one of the potential equity investors. It was not able to secure such an alternative deal. Management reported to the board that it was highly unlikely that the corporation could obtain interim funding from an entity other than Harbinger and that the Harbinger

proposal was the only viable alternative in the circumstances. The board then instructed management to negotiate with Harbinger. ACDL submits that this was a reasonable decision in the circumstances.

[166] As noted above, I have concluded that given the communications he had received from the petitioners, it was not unreasonable for Mr. Shoemaker to conclude that neither was prepared to invest any further funds. On the basis of that conclusion it was reasonable for him not to approach the petitioners for bridge financing. It follows that the failure to do so was not a breach of the petitioners' reasonable expectations. I find further that the board decision was reasonable in all of the circumstances.

B. Causation

[167] I have found a breach of the petitioners' reasonable expectation that was unfairly prejudicial to their interests with respect to the October 2009 Loan, but not with respect to the January 2010 Loan. The next matter to be addressed is whether the breach caused any damage to the petitioners. The petitioners submit that the breach put in motion a chain of events that ultimately led to the extreme dilution of the petitioners' shares. The "links" in this chain of events are as follows.

1. Would the October 2009 Loan have been made on more favourable terms?

[168] Mr. Lester deposed in his first affidavit that:

Had Bessemer been advised by the company in October 2009 of the terms that Harbinger was seeking (and which were ultimately agreed), Bessemer would have made the \$3 million loan on behalf of the Fund on the terms of the term sheet attached as Exhibit 12 to my affidavit. As well, assuming that Harbinger advised the company that it was not prepared to forbear unless its loan terms were accepted, Bessemer would have assessed the risk that Harbinger would act on the company's default (having forborne to date despite continuing defaults by the company and the risk to Harbinger that it would recover nothing on its investment) and would have given serious consideration to negotiating a buy out of Harbinger's position on behalf of the Fund. If Bessemer had decided to buy out Harbinger's position on behalf of the Fund, the total investment would still have been modest relative to the size of the Fund.

[169] The term sheet to which he refers is the draft dated October 15, 2009 which provides for security to be issued to Bessemer, interest at 20% per annum and warrants to be issued. Since the amount at issue is relatively small and since he was prepared to advance half of the \$3 million on those terms, it seems probable that Mr. Lester would have approved a \$3 million loan on these terms.

- [170] However, there are at least two problems with this scenario. It presumes that Bessemer would obtain security, but there was none to be had since Harbinger was unwilling to share its security. In addition, the ACDL board concluded at the November meeting that the revised proposal from Harbinger was more attractive than the term sheet with the warrant. That is a conclusion that is reasonable in the circumstances, and one supported by Mr. Leone's opinion. I conclude that this option would likely not have occurred.
- [171] In addition, I conclude that a loan on the terms of the October 15 draft would not have had causal significance. I note that Mr. Brandt stated that the terms of the October 2009 Loan were significantly more onerous than the rate of return contemplated in the October 15 term sheet.
- [172] However, Mr. Leone concluded that the October loan was actually cheaper than the October 15 term sheet once all surrounding terms had been considered. In particular, he notes that Mr. Brandt does not account for the value of the warrants in the October 15 term sheet. This appears to have been the view that ACDL's board took of the matter.
- [173] I have concluded that when the value of the warrants is considered, it is not the case that the terms of the October 2009 Loan are significantly more onerous than those of the October 15 term sheet.
- [174] In his third affidavit, Mr. Lester deposes that:
- had I known about the interest rate that Harbinger sought on its October loan to the company, I would also have been prepared to do a straight loan on materially better terms for the company.
- [175] The petitioners note that the respondents did not suggest to Mr. Lester in cross-examination that he would not have been prepared to make a loan without warrant or security. This is certainly a factor in assessing the weight to be given to the evidence, but not the sole factor to be considered.
- [176] This evidence is not a reconstruction of business judgments that were made at the time or even, as is the case of the evidence from the first affidavit, a simple extrapolation from those judgments. Rather, it is an attempt to construct what judgments would have been made in response to a set of circumstances partly real and partly hypothetical. The effort is complicated by both hindsight and the existence of the litigation.
- [177] In that regard, I note that the first affidavit was sworn in February 2011. The third was sworn in August, after Mr. Leone's expert opinion which was dated June 17, 2011 and the affidavits of Messrs. Wolfe, Aymong and Shoemaker. In making this observation I am not suggesting anything about Mr. Lester's credibility. However, there can be no doubt that when giving this evidence in 2011, Mr. Lester has materially different knowledge that is bound to affect his thinking.

- [178] I think it is possible that, if approached and advised of what Harbinger was proposing, Bessemer would have offered an interest only loan without warrant or security on somewhat better terms. However, one difficulty in evaluating the potential causal significance of such a hypothetical transaction lies in the meaning to be given to the term "materially better". In the context of this oppression claim the term "materially better" would have significance only if it provided a link in the causal chain, that is, materially better in the sense that it would change the assessment of the potential investment by a third party investor. To have causal significance in this regard it would mean that it was sufficient to change a potential investor who was not prepared to invest into one who was.
- [179] In that regard, at the material time Mr. Lester would have had regard to securing reasonable compensation to Bessemer for the risks it would assume in providing the financing. I note that even though he was presumably motivated by the concern he described in his affidavit that the terms of the loan could discourage new investors, when he did offer to participate in the loan, he did not offer ACDL materially better terms; he offered to participate on the same terms as Harbinger was offering.
- [180] In addition, this loan was for a relatively small amount, less likely on its own to make a decisive difference in the analysis of any potential investor.
- [181] I note Mr. Leone's opinion that the terms of the October and January Loans were of a reasonable commercial quality having regard to the nature of the transaction, the surrounding commercial circumstances, the market conditions and the commercial practices of the time.
- [182] I conclude that it is not likely that had it been approached Bessemer would have offered a straight interest, unsecured loan without warrant on "materially better terms", meaning sufficiently more favourable to ACDL as to make material difference in the analysis of the company by a potential new investor.
2. Would the January 2010 loans have been made on more favourable terms?
- [183] I have concluded that it was not a breach of reasonable expectations for ACDL management to conclude that neither of the petitioners was prepared to advance further funds to the company. In addition, there is no reason to conclude that had Bessemer advanced the October Loan on different terms, Mr. Lester would have responded in a different way to ACDL's overtures for additional funds in December.
- [184] Even assuming that Mr. Lester were to have been approached, the same difficulties pertain. Mr. Lester deposed in his first affidavit that:

Assuming that the Fund had advanced the \$3 million loan in October 2009 and that the company had advised Bessemer in January 2010 that it required further interim funding in the amount of \$12.5 million, Bessemer would have given serious consideration to making a further loan on behalf of the Fund on the same terms as the term sheet referred to in Exhibit 12 of my affidavit. If Harbinger's 2007 security remained and it would not agree to continue to forbear unless the 12.5

million was done by it on its terms, Bessemer would have assessed the risk that Harbinger would act on the company's default (having agreed to continue to forbear until January 2010 and the risk to Harbinger that it would recover nothing on its investment) and would have given serious consideration to negotiating a buy out of Harbinger's position on behalf of the Fund. If Bessemer had decided to buy out Harbinger's position on behalf of the Fund, the total investment would still have been modest relative to the size of the Fund.

[185] He deposed in his third affidavit:

As stated in my first affidavit, I would have given serious consideration to a loan for the urgently required funds in January 2010, had I known of the terms proposed by Harbinger. While paragraph 50 of my affidavit states this in the context of an assumption that Fund had made the October 2009 loan, I would have given the same consideration to a further loan of emergency funding in January 2010 on materially better terms for the company than those offered by Harbinger, even if the Fund had not made the October 2009 loan. I would have done so to meet the same concern; that materially better terms for the company would still protect the Fund but not discourage potential future equity investors.

[186] I accept that if he had been presented with the situation in 2010, he would have given the matter serious consideration. However, I am not persuaded that the result of this "serious consideration" would have been a loan on "materially better terms" in the sense described above. When actually considering the situation, in October, Mr. Lester did not offer materially better terms, he offered to participate on the same terms.

3. Would there have been investors prepared to invest in advance of the July 31, 2010 deadline?

[187] The petitioners submit that the terms of the October 2009 and January 2010 loans had a materially adverse effect on ACDL's ability to attract new investors in a timely way. It was submitted that had ACDL been able to attract new investors in a timely way, the July transaction that resulted in the dilution would have been avoided, and they would not have suffered the harm.

[188] It is clear that ACDL recognized that the loans would need to be restructured and that the high cost of the loans would be a negative factor for potential investors. The advice that ACDL received from their advisors was to the same effect.

[189] Mr. Brandt's expert opinion was that the terms of the loans made it substantially more challenging for ACDL to raise equity financing after January 2010. Mr. Leone's opinion was that the terms of the loans did not unreasonably impair the company's ability to raise equity capital. He noted that the loans preserved ACDL's ability to carry on with the project and kept the prospect of long term value alive. Without the loans, in his opinion the company would have likely shut down.

[190] In addressing this element of the alleged chain of causation, it must be remembered that this venture was fraught with risk. The terms of the loans were but one of many factors that could cause an investor to conclude that this was not an attractive investment. Mr. Leone described these risks as follows:

25. The Company's ability to raise the equity financing required to meet the Financing Condition was affected by a number of perceived risks to the Project, including but not limited to:

- (i) the green field nature of the Project;
- (ii) the Project's location in a developing nation governed by the Communist party under one-party rule;
- (iii) the potential presence of substantial alleged political and economic corruption in Vietnam as measured by Vietnam's ranking in global corruption rankings;
- (iv) poor roads, airports, and other civil infrastructure associated with the Project location;
- (v) no construction drawings existed for the Project and therefore no reliable estimates of vendor and contractor costs or costs of procured construction materials existed;
- (vi) the high rate of inflation in Vietnam;
- (vii) gambling is illegal in Vietnam for Vietnamese nationals;
- (viii) potential competition from other similarly planned and announced resort projects in Vietnam;
- (ix) the inexperience of ACDL's then management team; and
- (x) the lack of legislation providing the regulatory or tax laws required to enable ACDL's business plan.

[191] Moreover, no investor has been identified who declined to invest because of the terms of the October and January loans. Finally, what ACDL required in order to retain the investment certificate was \$125 million, a substantial investment which would entail significant due diligence. In order to establish causation, one would have to posit the existence of an investor who was now prepared to invest because of more favourable terms of the October 2009 and January 2010 loans and who would have completed its due diligence before the July deadline. No such potential investor has been identified. In my view, it is pure speculation to conclude that one exists.

[192] I find that the petitioners have failed to establish causation, a necessary element in the oppression claim. Every link in the alleged chain of causation is problematic. I have concluded that no link has been established to be probable. Viewed as a whole, the matter becomes one of pure speculation, far from sufficient to discharge the burden of proof. Because the petitioners have failed to establish a necessary element of the claim, it follows that the claim against ACDL is dismissed.

[193] As noted at the outset of this section, I have addressed the case advanced by the petitioners in their oral and written submissions. In their submissions, the petitioners do not target ACDL's decisions to enter into the Impugned Transactions. With regard to those decisions of the board, I am satisfied that in each case the decision was a reasonable business decision in all of the circumstances at the time that it was made. In addition, at the time the board made its decision to enter into each of the Impugned Transactions there was no available alternative identified, let alone one that was clearly beneficial, see Maple Leaf.

VI. Claim Against Harbinger

[194] The claim advanced against Harbinger is one of accessory liability, one feature of which is that it cannot be sustained if there is no primary liability. Accordingly, since the petitioners have failed to establish the claim against ACDL, it follows that the claim against Harbinger also fails. However, in the event that I am wrong with respect to the conclusion reached concerning the liability of ACDL, I will consider the claim advanced against Harbinger.

[195] As noted above, the amended petition includes an allegation that by reason of its security arrangements from and after October 2009, Harbinger was able to exercise de facto control over the company. This allegation was not pursued at the hearing. The petitioners stated in the written submission:

The petitioners do not take the position that Harbinger acted, in effect, as a director of the company and that its acts can be treated as if they were the acts of the company.

[196] The claim that was advanced was that Harbinger is liable as an accessory, procuring the wrongful conduct for its own purposes. It was submitted that Harbinger procured the oppressive conduct in that it induced, incited or persuaded ACDL to particular actions which it knew or ought to have known constituted oppression.

[197] The petitioners submit that Harbinger procured ACDL's oppression having regard to the following taken together:

- (a) Harbinger's objective was to dilute the other equity holders;
- (b) it proposed loans on commercially unreasonable terms;
- (c) it misled the Company as to its intentions with respect to forbearance to "give cover" to the board with respect to the terms vis-à-vis the shareholders;

- (d) it falsely represented its intention in order to persuade the company to pay an extortionate rate of interest under the October 2009 Loan; and
- (e) it took advantage of the position it had secured when negotiating the terms of the January 2010 Loan and in exercising control over the Company thereafter.

[198] The petitioners submit that this is a case of Harbinger committing an intentional tort in order to persuade ACDL to breach its duty to its shareholders. It is important to note that the allegation that Harbinger committed an intentional tort is the subject of a separate action by the petitioners in which they allege that Harbinger unlawfully interfered with their economic relations. This action is based on conduct that includes the alleged misrepresentations made to ACDL during negotiations relied upon in this proceeding. While Harbinger denies any wrongdoing, it submits, in the alternative, that the tort action is the proper forum in which to try these allegations.

[199] The petitioners cite *Lumley v. Gye* (1853), 118 ER 749, for the proposition that a person who procures another to commit a wrong incurs liability as an accessory. In *OBG v. Allan*, [2007] UKHL 21, Lord Hoffman noted that the accessory liability articulated in *Lumley* for inducing breach of contract required a degree of participation in the breach of contract which satisfies the requirement for accessory liability. He noted further that where there is no primary liability, there can be no accessory liability. Finally, with respect to liability for inducing breach of contract, the intent necessary for the accessory was the intent to cause a breach of contract.

[200] The concept of the degree of participation required to establish accessory liability was addressed in *CBS Songs Ltd. v. Amstrad Consumer Electronics Plc*, [1988] A.C. 1013. In *CBS*, Lord Templeman described the requirements for a finding of liability as an accessory in a case involving allegations of breach of copyright as follows at p. 14:

My Lords, I accept that a defendant who procures a breach of copyright is liable jointly and severally with the infringer for the damages suffered by the plaintiff as a result of the infringement. The defendant is a joint infringer; he intends and procures and shares a common design that infringement shall take place. A defendant may procure an infringement by inducement incitement or persuasion. But in the present case Amstrad does not procure infringement by offering for or unlawful copying and it does not procure infringement by advertising the attractions of its machine to any purchaser who may decide to copy unlawfully. Amstrad is not concerned to procure and cannot procure unlawful copying. The purchaser will not make unlawful copies because he has been induced or incited or persuaded to do so by Amstrad. The purchaser will make unlawful copies for his own use because he chooses to do so. Amstrad's advertisements may persuade the purchaser to buy an Amstrad machine but will not influence the purchaser's later decision to infringe copyright. Buckley L.J. observed in *Belegging-en Exploitatiemaatschappij Lavender BV v. Written Industrial Diamonds Ltd.*, (at 65): 'Facilitating the doing of an act is obviously different from procuring the doing of an act.' Sales and advertisements to the public generally of a machine which may be used for lawful or unlawful

purposes, including infringement of copyright, cannot be said to 'procure' all breaches of copyright thereafter by members of the public who use the machine. Generally speaking, inducement, incitement or persuasion to infringe must be by a defendant to an individual infringer and must identifiably procure a particular infringement in order to make the defendant liable as a joint infringer.

- [201] Harbinger asserts that it cannot be held liable for acting as an accessory to ACDL's oppressive conduct pursuant to the provisions of either the CBCA or the BCBCA. It submits that shareholders of a corporation do not owe a duty to one another and are entitled to negotiate in their own self-interest, even if those interests are contrary to the interests of other shareholders, citing *Brandt Investments Ltd. v. KeepRite Inc.* (1991), 80 D.L.R. (4th) 161 (Ont. C.A.). Thus, the petitioners could have had no reasonable expectation that Harbinger would act otherwise, or that they might not be diluted as a result.
- [202] Harbinger submits that it is only corporate conduct which is properly the subject of the oppression remedy, citing *Budd v. Gentra Inc.*, [1998] O.J. No. 3109 (C.A.). It follows in Harbinger's submission that the oppression remedy was never intended, and should not be extended to cover the conduct of arm's length third parties such as Harbinger.
- [203] Harbinger relied upon the decision in *Stern v. Imasco Ltd.*, [1999] O.J. No. 4235 (S.C.J.). In *Stern*, the defendant British American Tobacco P.L.C. ("BAT") was a shareholder of Imasco Ltd. BAT and Imasco entered into an agreement by which BAT would acquire all of the shares of Imasco that it did not own. The plaintiff, a shareholder of Imasco, commenced an action alleging that the proposed transaction was oppressive. Cumming J. dismissed the claim against BAT on the basis that the pleadings did not disclose a reasonable cause of action, stating at paras. 95 and 97:

The language is clear that the grounds of complaint must relate to the corporation, Imasco, of which Mr. Stern is a shareholder. However, the remedies available to a court under s. 241(3) are broad in that the court may make any "order it thinks fit". In my view, while the alleged oppression must arise in respect of the complainant's relationship to a corporation (as a shareholder of Imasco in the case at hand) the reach of oppressive conduct covered by s. 241(1) is general. The intent and language of s. 241(1) is to give status to a complainant shareholder of a corporation in bringing an oppression application whenever the oppressive conduct affects adversely his reasonable expectations as a shareholder of that corporation. The source of the oppression will be from within the corporation. However, the source of the oppression can conceivably be from someone who is merely a shareholder. For example, it might be that a shareholder effectively controls corporate decision-making in a closely-held corporation through a shareholders' agreement such as to cause the wrongdoing. However, in respect of a public corporation, such as Imasco, it is the board of directors that is the sole directing mind of the corporation. It is the corporation and the directors who are to be held responsible if grounds of oppression exist within the meaning of s. 241(2). For this reason, in my view, the statement of claim does not allege oppressive conduct against BAT to which s. 241 of the CBCA can apply. The claim for oppression against BAT under the CBCA cannot be sustained.

...

In my view, all of these allegations state the obvious. BAT has negotiated the Agreement with Imasco. The directors of Imasco made the decision to enter into the Agreement. If there is oppressive conduct in respect of the public shareholders it is only Imasco and the directors who are accountable.

[204] The petitioners do not assert that Harbinger acted in effect as the director of ACDL such that its acts can be treated as those of the company. This concession is consistent with the evidence which discloses that ACDL was a public company, with a board of directors, which at all material times was not controlled by any shareholder. Indeed at material times Harbinger did not have a representative on the board.

[205] Given the tort claim, I will say as little as possible with respect to the allegations the petitioners make against Harbinger that are the subject of that litigation. In my view, the evidence does not support a finding that Harbinger had sufficient participation to found accessory liability as described in CBS. There is no evidence that Harbinger induced, incited or persuaded ACDL to do the acts that are alleged to have constituted the oppression. In particular, there is no evidence that Harbinger told, suggested or encouraged ACDL not to canvass bridge financing with the petitioners in October 2009 and January 2010.

[206] The petitioners stated in their written submissions that Harbinger committed an intentional tort in order to persuade ACDL to breach its duty to the shareholders. In my view, the evidence does not support a conclusion that Harbinger intended that ACDL act in an oppressive manner to its shareholders. There is no evidence that any of Harbinger's officers ever turned their minds at the relevant times to this issue. The evidence before me does not lead me to infer that was the intention of any of the officers at its material times.

[207] Assuming without deciding that the concept of accessory liability is applicable at all in the context of an oppression claim, I find that it is not made out in this case. The petitioners' claim against Harbinger in essence is that it committed an intentional tort, and that in the result, ACDL oppressed the minority shareholders. However, the necessary connection between Harbinger and the acts complained of as oppressive is not present. In the result, even if I am wrong in my conclusion that there is no oppression on the part of ACDL and hence no primary liability, I conclude that the petitioners have failed to establish that Harbinger is liable as an accessory. Accordingly, the claim against Harbinger is dismissed.

[208] The petition is dismissed with costs to the respondents.

"Ross J."

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