

CANADA / JUDGMENT

Ten Hoeve v. Beukens

2020 BCSC 1194

COURT

Supreme Court of British Columbia

DECIDED

13 August 2020

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2020 BCSC 1194 Ten Hoeve v. Beukens

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ten Hoeve v. Beukens,

2020 BCSC 1194

Date: 20200813

Docket: S160034

Registry: Vancouver

Between:

James Ten Hoeve and Dawn Ten Hoeve

Plaintiffs

And:

Robert Beukens and 3 Oaks Dairy Farms Ltd.

Defendants

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiffs, appearing in person (July 23) and via teleconference (July 24):

C. Elrick

Counsel for the Defendants, appearing via teleconference:

D. MacAdams, Q.C.

Attendee, Ross Siemens, appearing via teleconference:

R. Siemens

Place and Dates of Hearing:

Vancouver, B.C.

July 23-24, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 13, 2020

Introduction

- [1] The plaintiffs, in this unfortunate and prolonged family dispute, seek remedies pursuant to ss. 324 and 227 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA] to windup 3 Oaks Dairy Farms Ltd. (the "Company") due to what they say is a breakdown in trust and confidence between and among shareholders such that their relationship has been irretrievably destroyed.
- [2] The defendants say that this action is the culmination of the plaintiffs' unjustified and long-standing desire to monetize their interests in the Company regardless of its impact on the Company's ability to carry on as a going concern. The defendants say that, despite there being strongly held and incompatible differences between the parties and their respective objectives, they remain willing to re-engage with the plaintiffs and work with them with a view to having their interests paid out on a schedule that is consistent with permitting the Company to carry on in business. They say that their relationship with the plaintiffs has not deteriorated to the point that it is beyond salvage.
- [3] The issues for determination are whether (a) in all of the circumstances, it is just and equitable to order that the Company be wound up and liquidated and, if so, (b) what the appropriate order should be.

Background

- [4] The Company owns and operates a dairy farm in the Fraser Valley of the Lower Mainland of British Columbia (the "dairy farm"). There are three shareholders of the Company: the plaintiffs, James Ten Hoeve ("James") and Dawn Ten Hoeve ("Dawn") who are husband and wife, and the defendant, Robert Beukens ("Robert"). Robert is Dawn's step-brother.
- [5] James and Dawn collectively own 47.8% of the voting shares of the Company. Robert owns the remaining 52.2%. Each of James, Dawn, and Robert also own 200 preferred non-voting shares of the Company.

The Family Dairy Farm

- [6] The dairy farm, at the heart of this dispute, was owned by Robert's father (Dawn's step-father), Tjitze Beukens ("Jim") and Dawn's mother (Robert's step-mother), Joyce Beukens ("Joyce"). Jim and Joyce bought the farm in 1969. At that time, it was called Vedder View Farms. It is now known as 3 Oaks Dairy Farm Ltd. (i.e., the Company).
- [7] The farm consists of 72 acres of owned land and 10 acres of rented land. It has a herd of 60 to 70 cows and 60 to 70 replacement cows. The farm grows its own corn and grass as silage for feed for the cows.
- [8] Dawn lived on the farm from 1979 until 1985 when she married James. In 1988, James and Dawn moved to a home adjacent to the dairy farm.
- [9] Jim and Joyce operated the dairy farm as a partnership between 1979 and 1997. Throughout this time period, Dawn and James assisted with the farm work.
- [10] In February 1997, Robert, Jim, Joyce and James executed a partnership agreement (the "Partnership Agreement") regarding the dairy farm business. The Partnership Agreement contained the following material terms:
- a) Robert and James would each receive a 1/3 interest in the farm, with Jim and Joyce each retaining a 1/6 interest;
 - b) each partner would have "equal rights in the management of the Partnership business" and a single vote on all matters affecting the Partnership that requires a decision of the Partnership;
 - c) significant decisions would require a majority vote of the partners with the additional requirement that Jim be included in the majority;
 - d) a partner could not transfer his/her interest in the Partnership without the consent of the other partners;
 - e) Jim and Joyce would have the right to retire from the Partnership at any time by providing Robert and James with three months' notice;
 - f) upon Jim and Joyce's retirement, Robert and James would have the right to purchase Jim and Joyce's interest or terminate and liquidate the Partnership;
 - g) each of Robert and James had the right to retire from the Partnership by giving one year's notice, in which case the other partner had the right, at his option, to purchase the retiring partner's interest over 10 years;
 - h) if either Robert or James became disabled, he would be entitled to receive his full regular draws from the Partnership during the first ninety days. Following that, he would be able to collect disability insurance; and

- i) if either Robert or James were to be disabled for a period of over one year, he could be expelled from the Partnership by the other. If expelled, the disabled partner would be entitled to his share of the farm's net profits during the twelve-month period (less any amounts received by way of disability insurance) and to have his interest in the Partnership paid out over 10 years.
- [11] After the Partnership Agreement was executed, James and Dawn continued to help on the farm, albeit on only a part-time basis. Robert worked full time on the farm. All of the partners met regularly and participated in the management of and the decisions relating to the dairy farm business. James and Dawn were paid \$800 and \$300 per month, respectively. Robert was paid \$1000 per month.
- [12] The dairy farm business was incorporated in 1999. The incorporation was driven by tax considerations. Each of the partners was appointed as a director of the Company. James' salary was increased to \$1,000 per month. Robert's salary was increased to \$1200 per month.
- [13] Upon incorporation of the Company, each of the partners exchanged their interest in the Partnership for shares and promissory notes that were recorded as shareholder loans in the Company's financial statements as follows:
 - a) Jim and Joyce each received 50 Class "A" Voting Common Shares and a promissory note representing their equity in the Company. In addition, they collectively received 150 Class "I" Voting Preferred Shares;
 - b) James received 100 Class "A" Voting Common Shares, 100 Class "G" Non-Voting Preferred Shares with a par value of one cent each, and a promissory note for \$567,455 without interest (the "Promissory Note");
 - c) Robert received 100 Class "A" Voting Common Shares, 100 Class "H" Non-Voting Preferred Shares, and a promissory note for \$487,391 without interest.
- [14] The Articles of Incorporation of the Company include the following provisions:
 - a) no shares in the Company can be transferred without the prior consent of the Directors. The Directors may refuse their consent and are not required to give any reason for refusing to consent to any proposed transfer. Even a transfer of shares upon death of a shareholder remains subject to the Directors' approval;
 - b) the Directors have the sole power to take on debt, determine the amount of Directors' compensation, determine whether to pay a dividend and redeem shares.

- [15] In 2005, Jim and Joyce gifted their Common Class "A" shares to Robert and James. Robert received 60 shares and James received 40 shares. In exchange, the parties executed three agreements pursuant to which Jim and Joyce (a) were able to remain in their home on the farm's property, (b) received a \$20,000 per year "management bonus" from the Company (which James and Robert personally guaranteed), and (c) a promissory note for \$178,432 representing their shareholder loan.
- [16] Other than in respect of the resulting tax treatment, the incorporation of the dairy farm business was inconsequential. The business continued to run informally as a family business under the Partnership Agreement.
- [17] As the years went by, disagreements emerged between and among the parties to the Partnership Agreement regarding how the dairy farm should be managed and operated. The Company's long-time accountant deposed that "I knew that for many years the shareholders of [the Company] were not getting along and that there were disagreements and tensions among them". In 2004 and again in 2010, the shareholders hired a mediator in a largely unsuccessful attempt to work out their differences.
- [18] In approximately 2008, James suffered a flare up of a latent heart condition he had had since he was young. James was also diagnosed with post-traumatic stress disorder after years of working as correctional officer at Matsqui Institution. These conditions were such that he became very ill and was no longer able to work on the farm. He was diagnosed with chronic atrial fibrillation, hypertrophic cardiomyopathy, and diabetes. He began receiving disability insurance payments through his employer, the Correctional Service of Canada.
- [19] The defendants are in agreement that James has been disabled and unable to provide services to the farm since 2008. James and Dawn expressed their desire to monetize their interest in the Company by being bought out. This appears to have been the genesis of the litigation that later ensued.
- [20] Jim passed away in 2009. Joyce inherited Jim's shares in the Company.
- [21] In April 2010, the Directors approved the transfer of James' shares to Dawn with an effective date of November 12, 2009. After the share transfer, James was no longer a shareholder in the Company but remained a Director.
- [22] Also in 2010, Robert attempted to purchase the plaintiffs' shares in the Company but he was unable to secure the necessary financing.
- [23] On January 28, 2011, James, Dawn, Robert, Gwen (Robert's wife) and Joyce signed a share purchase agreement pursuant to which all of the shares in the Company were to be sold to Blackstone Farm Financial ("Blackstone"). Ultimately, the transaction did not complete.
- [24] Following the collapse of the Blackstone deal, the relationship between Robert, James and Dawn further deteriorated. James and Dawn became estranged from Robert and his family.

- [25] On April 4, 2011, James and Dawn wrote to Robert demanding that he purchase their shares, threatening litigation if he did not. After almost one year, Robert responded with two letters, dated February 1 and March 6, 2012, respectively. In the letters, Robert detailed what he considered were the "shared expectations" of the parties, what the plaintiffs' options were and what he thought should happen. Those thoughts did not include a buyout of the plaintiffs' interests and Robert indicated he did not "expect to make any counteroffer in the foreseeable future". There is no question that the letters were intended by Robert to make it crystal clear to the plaintiffs that he was calling the shots and was utterly disinterested in anything other than a continuation of the status quo. Robert also made it clear that anything less than total capitulation on the part of the plaintiffs would result in James being removed as a Director of the Company.
- [26] By a letter dated March 13, 2012 in response, the plaintiffs made it clear to Robert that they did not share Robert's views and that James expected to continue in his role as a Director of the Company. They also asked for an audit of the Company's finances.
- [27] In 2012, James and Dawn assigned the benefit of the Promissory Note to an unrelated company named 0933032 B.C. Ltd. ("093").
- [28] At the Company's Annual General Meeting on March 20, 2012, James was removed as a Director of the Company and his and Dawn's salaries were revoked. Gwen was appointed as a director as was Joyce's son-in-law, Ross Siemens ("Ross"). Simultaneously with these events, Robert's salary was increased to \$44,200 per year (\$3685 per month). Robert and Gwen's son, Nathan, was granted a salary of \$2,000 per month and Gwen received a salary of \$500 per month.
- [29] Since 2012, Robert has operated the dairy farm business to the exclusion of James and Dawn. In addition:
- a) Robert and Gwen live rent-free in the house on the farm that was formerly occupied by Jim and Joyce. Nathan lives rent-free in another house on the farm property that was formerly occupied by Robert and Gwen. Another of Robert and Gwen's sons, Aaron, lives in that house with Nathan and pays a nominal rent of \$300 per month;
 - b) Robert and his family members are the only salaried employees of the Company. Since 2012, James and Dawn have received no income or other benefits from the Company;
 - c) the Company has not distributed any dividends to James or Dawn;
 - d) Robert has expressed the intention to pass the Company to his sons and has refused to involve James or Dawn in succession planning; and
 - e) Robert has excluded James and Dawn from any form of management of the Company.

- [30] Shortly after James was removed as a director of the Company, 093 made a demand on the Company for payment of \$400,000 under the Promissory Note and commenced litigation when payment was not made ("the Promissory Note Action").
- [31] At trial, the Court dismissed the Promissory Note Action on the basis that certain terms of the Partnership Agreement subsisted: 0930032 B.C. Ltd. v. 3 Oaks Dairy Farms Ltd., 2014 BCSC 1728. The decision at trial was upheld on appeal: 2015 BCCA 332. The Court of Appeal concluded that the Partnership Agreement amounted to a "collateral or umbrella agreement":
- [44] In summary, the trial judge found that Robert and James received the "gift" of their equity in the partnership subject to the conditions set out in the partnership agreement, and that those terms continue to bind the parties notwithstanding the transition to the corporate form, and were recognized as such by them. She also found that the business would be endangered by 3 Oaks' having to pay James' shareholder loan out on 30 days' notice. It followed that the plaintiff was not entitled to make demand under the Note, James being bound by the "umbrella," or subsisting, agreement not to act in a manner inconsistent with the long-term viability of the business - i.e., not to make demand under the Note in the circumstances in which 3 Oaks finds itself. When and if it becomes possible to make demand under the Note and to be paid without bringing the business to a halt, demand can be made and the outstanding amount thereof will be payable within 30 days.
- [32] The Court of Appeal went on to make the following observation:
- [46] Lest it be thought that the trial judge's order leaves James in a tenuous position vis-à-vis his interest in 3 Oaks, I note that according to the continuing 'understanding' found by the trial judge, the consents of both James and Robert are necessary for the taking of various actions (see para. 17 of the partnership agreement) and, it appears, that if a disabled partner is 'expelled' he remains entitled to receive the value of his interest from the other, payable over ten years. The agreement is unclear as to what role the retiring or disabled partner is to play in the operation of the business until he has been paid out. It may be that Robert's action in not electing James as a director of 3 Oaks is a breach of the agreement and amounts to 'expelling' James, or even to a repudiation. Certainly there are "expectations" that, as Mr. Cowper suggested, might found an oppression action. But these issues are not before us and it is earnestly to be hoped that they can be addressed by James and Robert without further litigation.
- [33] Joyce passed away in 2015. In her will, Joyce left her 150 Class "I" Voting Preferred Shares to Robert and James, to be divided equally.
- [34] Robert has conceded that he continues to be bound by the Partnership Agreement notwithstanding the farm's transition from the Partnership to the corporate form.

- [35] Despite the foregoing admonitions and, indeed, guidance dispensed by the Court of Appeal over five years ago, little, if anything, changed. The estrangement and animosity between the parties continued unabated.
- [36] In 2018 and 2019, Robert caused the Company's debt to increase from approximately \$1 million to \$4.67 million by "scaling up" the farm's business. He caused the Company to purchase additional milk quota, cows, farming equipment, and built a new barn. Robert has not provided any underlying business plan or financial justification for these expenditures.
- [37] The plaintiffs say that, despite owning only a bare majority of the Company, Robert is enjoying all of its benefits while the plaintiffs receive nothing. Robert has made it clear to the plaintiffs that he intends to ensure that the farm stays in his family and is passed on to his sons.
- [38] The plaintiffs say that the partnership-like relationship among the parties has broken down to the point that it is beyond repair. James and Robert have not spoken in years. The plaintiffs say that the situation cries out for a court-imposed resolution under the BCA, without which it is unlikely that they will ever receive any benefit from the Company.
- [39] The defendants say that it was always Jim and Joyce's intention that the farm stay in the family and be passed down by each generation to the next. Although Robert concedes that neither Jim nor Joyce ever mentioned this intention to him, Ross (the son-in-law) has deposed that Jim and Joyce told him that they intended that the farm continue as a dairy farm and "hoped the farm would remain in the family".
- [40] The defendants also say that this is not a case where the relationship between and among the parties has deteriorated beyond salvage. Rather, they say that the relationship is merely "frosty" and "estranged". Robert has deposed that he:

would consider favourably voting my shares to elect James or Dawn as a director, voting in favour of having [the Company] provide James and Dawn with electronic access to all banking records of [the Company] and access to all financial documents of [the Company] as they request; calling at least four meetings per year of the directors to review and discuss the operations of [the Company] providing for monthly payments to James and Dawn as the cash flow of [the Company] permits; and working with James and Dawn towards the objective of cashing out their interests on as rapid a schedule as is consistent with permitting [the Company] to carry on its ordinary business as a dairy farm.

- [41] The defendants submit that the court should not consider it just and equitable to liquidate and dissolve the Company merely because Robert seeks to give the next generation an opportunity to get into the dairy business, even though his doing so may cause difficulties in his relationship with the plaintiffs.

Legal Principles

- [42] The material provisions of the BCA are as follows:

Oppression Remedy

227(2) A shareholder may apply to the court for an order under this section on the ground

- (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
- (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.
- (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order
 - (a) directing or prohibiting any act,
 - (h) directing a shareholder to purchase some or all of the shares of any other shareholder,
 - (o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security

Liquidation

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

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

[43] Sections 324 and 227 of the BCA contemplate a summary procedure to provide parties with a timely and inexpensive resolution of their dispute: *Whistler Service Park Ltd. v. Glacier Creek Development*, 2005 BCSC 1942, at paras. 34-38, aff'd 2005 BCCA 472; *Kinzie v. The Dells Holdings Ltd.*, 2010 BCSC 1360 at paras. 13-15.

- [44] Section 324(b) of the BCA provides that a court can order a company liquidated and dissolved if it considers it just and equitable to do so. The words "just and equitable" are of the widest significance and confer a broad discretion on the court: *Kidner Investments Ltd. v. Totem Mercury Holdings Ltd.*, 2017 BCSC 205 at para. 69. Each case depends to a large extent on its own facts: *King City Holdings Ltd. v. Preston Springs Gardens Inc.* (2001), 14 B.L.R. (3d) 277 (O.N.S.C.) at para. 10.
- [45] The just and equitable test set out in s. 324 represents a lower threshold than that under the oppression remedy set out in s. 227. Under s. 324, there is no requirement of a finding of oppression, or unfairly prejudicial conduct, or other wrongdoing by either party. Nor is it necessary that there be a finding that the conduct of the company's affairs are being impeded: *Safarik v. Ocean Fisheries Ltd.*, (1995) 12 B.C.L.R. (3d) 342 (C.A.) at para. 84; *Callahan v. Shasta Properties Ltd.*, 2015 BCSC 663 at para. 81.
- [46] Where, as here, a private company "can fairly be called a partnership in the clothes or under the guise of a private company", the principles of equity developed in relation to partnerships may be applied to it: *Vivian v. Firth*, 2012 BCSC 517 at paras. 72-80. As was stated in *Vivian*, at para. 78, companies which are, in substance, partnerships may be wound up on equitable grounds in circumstances where:
- a) a breakdown of the mutual trust and confidence upon which the original undertaking was founded;
 - b) a "destruction of mutual confidence"; and
 - c) a refusal to meet on matters of business, continued quarreling and such a state of animosity as precludes all reasonable hope of reconciliation and friendly cooperation.
- [47] In the context of a dispute within a closely held family company, the Court of Appeal in *Safarik* stated that:
- [100] Family companies are very different from non-family companies
- [102] , it is not erroneous to take a more liberal approach to the words 'just and equitable' in the case of a family company in which one of the family after many years of service is no longer permitted to participate in the business.

Analysis

- [48] The parties are in agreement, indeed the Court of Appeal has made it clear, that the rights of the Company's shareholders in this case continue to be governed by the terms of the Partnership Agreement. The difficulty is that there is a fundamental difference between the parties regarding their respective objectives. The defendants, on the one hand, want to be able to carry on operating the dairy farm as Jim and Joyce had done before them. Robert and Gwen want to provide their children with the opportunity to continue operating the farm after them. The plaintiffs on the other hand simply want to "cash-out" and move on.

- [49] Where there are strongly held and incompatible differences of objectives, the temptation is to try to resolve them by disentangling the parties in the fairest and most efficient way possible: *Mostyn v. Schmiing*, 2011 BCSC 275 at para. 18. However, the courts are not required to resolve every difference of objectives that parties may have: *Boffo Family Holdings Ltd. v. Garden Construction Ltd.*, 2011 BCSC 1246 at para. 113.
- [50] The question for determination in this case, however, is whether the differences between the parties are such that it is just and equitable to liquidate and dissolve the Company. In other words, has there been "a breakdown of the mutual trust and confidence upon which the original undertaking was founded" such that there is no choice other than a winding up of the Company?
- [51] It is abundantly clear on the evidence that the parties have been mired in conflict for more than ten years, most of that time in litigation. Since James was removed as a director of the Company in March 2012, Robert and his family have received all of the benefits of the farm including exclusive use and occupation of its houses. The Company has paid for all of the expenses associated with the houses including utilities, maintenance and insurance. Robert has treated the farm as his and has virtually excluded the plaintiffs from any association with it despite James and Dawn's collective 47.8% ownership.
- [52] "Expel" is defined by the Oxford English Dictionary as follows:
- i. force or drive out.
 - ii. officially make (someone) leave a school or other organization.
- I find that James was expelled from the Partnership on March 20, 2012 and has remained expelled since that time.
- [53] Since James' expulsion, the plaintiffs have been steadfast in their demands that their interests be bought out. Robert has been equally steadfast that the Company is in no financial position to meet the plaintiffs' demands any time soon, that his intention is to maintain the current status quo indefinitely, and that he wants his sons to eventually take over his majority interest in the Company. The court is in no position to assess whether this ongoing strife was/is rooted in mere estrangement, as the defendants say, or outright hostility, as the plaintiffs maintain. What is clear is that neither side has confidence in or trusts the other to do what they perceive is right.
- [54] I do not accept that the defendants' assertion regarding Jim and Joyce's intention for the dairy farm to remain "in the family" is a factor to be given greater significance than other factors. I agree with counsel for the plaintiffs that Ross's evidence regarding Jim and Joyce's wishes is inadmissible hearsay that does not meet the threshold required by the principled exception to the hearsay rule. In my view, the circumstances in which Ross' affidavit evidence was provided do not offer sufficient guarantees of trustworthiness. Much of his evidence also does not meet the requirement of necessity because it deposes to conversations between others with no explanation as to why those others did not provide

first-hand evidence.

- [55] Regardless, even if Ross's impugned evidence were admissible, I would give it very little weight. Ross purports to suggest that Jim and Joyce often mentioned to him, a son-in-law who was not involved in the farm operations, their desire that the dairy farm remain in the family. Yet Robert gave evidence on his examination for discovery that they never mentioned such a desire to him (Robert), their own son, who worked full-time on the farm.
- [56] Ross's evidence also violates the parole evidence rule to the extent that it purports to suggest Jim and Joyce never wanted the dairy farm to be sold. That evidence is inconsistent with the terms of both the Partnership Agreement and Joyce's conduct after Jim died. The Partnership Agreement expressly stipulates that the Partnership could be liquidated after Jim and Joyce's retirement. In 2011, Joyce executed an agreement pursuant to which the shares in the Company were to be sold to Blackstone.
- [57] I do not accept as credible the hearsay opinion evidence in Ross's affidavit that Joyce signed the Blackstone agreement only because she "caved into pressure from James" and did so "in distress under duress".
- [58] In my view, a reasonable and objective person reading the Partnership Agreement as a whole would interpret it as contemplating a liquidation of the Partnership in certain circumstances--not that the dairy farm would remain in the family in perpetuity.
- [59] It is also my view that the Partnership Agreement does not provide for a mandatory payout of James' interest in the Partnership upon his election to retire or his becoming disabled. Rather, on James' retirement, Robert was given the option to purchase James' interest. If James became disabled, Robert's obligation to purchase his interest in the Partnership only arose upon James being expelled from the Partnership.
- [60] As stated above, it is my view that James was expelled.
- [61] I note Article 17 of the Partnership Agreement which stipulates that
- No Partner shall without the consent of the other do any act which would make it impossible to carry on the ordinary business of the Partnership.
- [62] Given the financial circumstances of the Partnership (now Company), James' requirement that his interest be fully and immediately paid out will make it impossible for the Company to carry on its ordinary business of owning and operating the dairy farm.
- [63] Nevertheless, I find that Robert has disregarded James' rights under the Partnership Agreement by:
- a) refusing to allow James equal rights in the management of the farm business or allow him to vote on matters affecting the Partnership, contrary to clause 10; and

- b) unilaterally proceeding with implementing decisions that required a majority vote of the Partnership, contrary to clauses 12 and 13.
- [64] The unilateral decision by Robert to significantly increase the Company's debt is particularly troublesome. That decision was made without any input from the plaintiffs and without an appropriate underlying business plan as to how taking on the increased debt will result in success for the Company. It has put all shareholders, including the plaintiffs, at risk.
- [65] The plaintiffs are in the invidious position of owning almost one-half of a valuable operating dairy farm without any prospect of participating in or benefiting from it. Their shares in the Company are illiquid. The plaintiffs are effectively in shareholder purgatory.
- [66] The evidence is clear that the mutual confidence upon which the Partnership Agreement was based has been shattered. There is no need for the Court to assess blame for why that happened. Rather, the Court's task is to determine the fairest and most efficient way to extricate the parties from their ongoing stalemate.
- [67] In situations involving very similar circumstances where the mutual trust between siblings working together in a family business has been irretrievably lost, this court has determined that the fair and equitable solution is to order either that one party purchase the other's interest in the business or, failing that, a dissolution and liquidation of the business: *Rendle v. Stanhope Dairy Farm Ltd. et al.*, 2003 BCSC 1894; *Sohi v. Best Choice Blueberry Farms Limited*, 2018 BCSC 36.
- [68] A proper consideration for an order under s. 324 of the BCA is the effect the order will have on other shareholders: *Safarik*, at para. 104.
- [69] Having considered the evidence as a whole and the able submissions of counsel, and having considered the effect the order sought will have on Robert and his family, I am of the opinion that the time has come for the lengthy conflict between the parties in this case to end and that it is just and equitable to order the Company to be liquidated and dissolved under s. 324(1)(b) of the BCA.
- [70] In ordering a winding up, s. 324(3) of the BCA provides the court with a broad discretion to structure the most appropriate remedial order available in the circumstances, including through any of the remedies set out in s. 227(3) of the BCA: *Whistler Service Park*, at para. 24. In many cases, shotgun buyouts have generally been considered a fair and efficient remedy.
- [71] Counsel have advised that, in this case, Robert is currently in no financial position to immediately purchase the plaintiffs' full interest in the Company for anywhere near fair market value. However, the evidence indicates that he may well have the financial wherewithal to fund a purchase of the plaintiffs' interest by way of a significant payment now followed by a reasonable payment schedule over time. In my view, that latter approach provides a sensible and common sense solution to the parties' conundrum. Although it will undoubtedly place each of the parties in some financial hardship, it will also inexorably lead

to a much needed final separation of the parties, albeit not on the timeline any of them prefers.

Conclusion

[72] I am making the following orders:

- a) within 90 days of the date of these Reasons for Judgment, Robert may elect (the "Election") to purchase the plaintiffs' collective interest in the Company. The Election must be made in writing to the plaintiffs or to their counsel;
- b) if Robert makes the Election, he will pay to the plaintiffs on or before December 31 of each year commencing December 31, 2020 and ending on December 31, 2022, the sum of \$400,000 (for a total payment of \$1,200,000) as an advance towards the purchase by him of the plaintiffs' collective interest in the Company. Each such payment, when made, will reduce the plaintiffs' collective interest in the Company by a corresponding amount;
- c) upon Robert (i) failing to make the Election, or (ii) making the Election but failing to make any of the payments contemplated in paragraph b) above when due, or (iii) making all of the payments contemplated in paragraph b) above, whichever first occurs, the Company will forthwith engage a business valuator (the "Valuator") approved by the plaintiffs to both value the Company as a going concern and value the then remaining collective interest of the plaintiffs in the Company. If the parties are unable to agree on the Valuator to be engaged, any party has liberty to apply to for an order that a Valuator be appointed by the Court;
- d) Neither the plaintiffs nor Robert will act or omit to act in any way that affects the integrity of the valuation or the ability of the Valuator to determine the valuation;
- e) within 60 days of the Valuator's determination of value, Robert may submit to the plaintiffs an offer to purchase their remaining collective interest in the Company at the value of that collective interest determined by the Valuator, in which event the purchase and sale of the plaintiffs' interest in the Company will close and be finalized within 60 days of the offer having been submitted;
- f) if Robert does not submit an offer as contemplated in paragraph e) above, or if the sale contemplated by paragraph e) above is not completed within the required 60 days, the Company will be liquidated and sold on the open market by a broker who specializes in the sale of farms and who is approved by the parties or, failing their agreement, appointed by the Court. The net proceeds of sale will be distributed to the plaintiffs and Robert in accordance with their then remaining respective interests in the Company;
- g) the broker contemplated in paragraph d) above will have liberty to apply to the Court for further directions regarding the marketing and sale of the Company and/or its assets.

[73] The parties are at liberty to apply before me for further directions if there is a lacuna in the foregoing orders.

COSTS

[74] The parties are also at liberty to make submissions as to costs.

"G.C. Weatherill J."

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