

CANADA / JUDGMENT

Weisstock v. Weisstock

2022 BCSC 209

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 209 Weisstock v. Weisstock

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Weisstock v. Weisstock,

2022 BCSC 209

Date: 20220210

Docket: S127397

Registry: Kelowna

Between:

Albert Weisstock

Petitioner

And

Walter Weisstock, Antony Weisstock, Silvia Rita Gerard, Witmar Holdings Ltd., Donald James Ramsay (Administrator of the Estate of Maria Concetta Weisstock), 1100748 B.C. Ltd., Antony Weisstock (Trustee of Willy and Maria Concetta Weisstock Trust), and Islandview Country Estates Ltd.

Respondents

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Petitioner:

S. Dvorak

Counsel for the Respondents, Walter Weisstock, Antony Weisstock:

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S. Silver

Counsel for the Respondent, Silvia Gerard:

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No other appearances

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 26 and 27, 2022

Place and Date of Judgment:

Kelowna, B.C.

February 10, 2022

- [1] The respondents Walter Weisstock and Anthony ("Tony") Weisstock apply for an order converting this petition to an action and that the matter be referred to the trial list. The application is opposed by the petitioner, Albert Weisstock, and the respondent, Silvia Gerard. I will refer to the individuals by first name solely for ease of reference.
- [2] The background of this matter is that the petitioner has commenced a petition seeking declarations that the affairs of Witmar Holdings Ltd. have been conducted in a manner that is oppressive or unfairly prejudicial to him. The relief sought includes orders for a liquidation or winding-up of Witmar Holdings Ltd. ("WHL").

Background

- [3] WHL is a company in British Columbia incorporated in 1981 by Witthold (Willie) Weisstock and Maria Weisstock for the purpose of investing, holding, and developing real estate properties in Kelowna. Willie Weisstock and Maria Weisstock are both deceased. The four individual parties to this litigation are their adult children.
- [4] Each of the four siblings are beneficial owners of twenty-five percent of WHL. WHL owns property now valued in excess of \$65 million. As such, the amounts in issue are not insignificant.

- [5] The petitioner was responsible for the day-to-day operations of WHL until approximately 2011, when he was terminated from that position. It was alleged that he ran the affairs of the company poorly, and there was a suggestion of some impropriety. This was disputed by the petitioner, and he filed a wrongful dismissal claim in 2012. Notwithstanding the effluxion of time, the matter has not yet proceeded to trial and has not been resolved in any other manner.
- [6] Following the commencement of the wrongful dismissal suit, the petitioner was removed as a director of WHL, based on both his prior conduct and the extant wrongful dismissal claim.

The Proceedings to Date

- [7] The petitioner commenced this proceeding by petition filed on April 23, 2020. The petitioner was unable to serve the respondent, Walter, and on November 10, 2020, the petitioner obtained an order for alternative service. Walter and Tony did not file a response until March 29, 2021, some five months after the alternative service order. In their response to the petition, Walter and Tony sought as relief an order to convert the petition to an action.
- [8] In the latter part of 2021, the respondents Walter and Tony brought an application to adjourn the hearing of the petition, which had been scheduled by the petitioner for November 2021. At that time Walter and Tony advised the Court that they intended to bring an application to convert the petition into an action. Master Schwartz adjourned the petition and set time parameters for the filing of this application, which have been complied with.
- [9] The applicants' affidavits in response to the petition were not filed until November 25, 2021, following Master Schwartz's order. Although an affidavit was filed on behalf of Walter, there is no evidence from Tony before the Court.
- [10] The petition hearing is currently set for three days during the week of March 28, 2022.

Legal test

- [11] The application is brought pursuant to Rules 16-1(18) and 22-1(7)(d) of the Supreme Court Civil Rules, which provide as follows:

16-1(18) Without limiting the court's right under Rule 22-1 (7) (d) to transfer the proceeding referred to in this rule to the trial list, the court may, whether or not on the application of a party, apply any other of these Supreme Court Civil Rules to a proceeding referred to in this rule.

...

22-1(7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may

- (d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

- [12] The test for conversion of an action is not seriously disputed. The Court of Appeal in *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 [Saputo], confirmed that the test for conversion of a petition to an action is whether there is a genuine triable issue, or in other words, "when there are disputes of fact or law, unless the party requesting the trial is bound to lose".
- [13] The Court of Appeal in *Saputo* clarified that the test for conversion is akin to the summary judgment test, as opposed to a determination of whether or not a matter is suitable for disposition by way of summary trial at para. 46:

The factors referenced in *Haagsman*, *Terasen* and *Boffo* are similar to those often applied in the trial court in determining whether a matter is suitable for summary trial under Rule 9-7.

However, as noted in *Robertson*, the test for determining whether a matter should be converted into an action is not that used to determine suitability for a summary trial, but rather is akin to that on application for summary judgment under Rule 9-6. The suggestion in *Boffo* that the mere existence of a bona fide triable issue is not in itself sufficient to warrant conversion to the trial list is, with respect, contrary to the test for converting a matter to an action established in this Court.

- [14] The applicant seeks to have the Court determine that the matter should be converted to an action as a preliminary matter, as opposed to leaving it to the judge who is scheduled to hear the petition to decide.

Positions of the Parties

- [15] The applicants, Walter and Tony, say their conduct has not been oppressive or unfairly prejudicial, and point to factual disputes regarding the petitioner's expectations and the reasonableness of those expectations as a critical matter for resolution determination in this dispute.
- [16] The applicants argue that there are significant conflicts in the evidence that will need to be resolved in order to determine whether or not the petitioner is entitled to the relief sought. They argue that since the test for conversion of a petition to an action is based on the summary judgment test and not the summary trial test, the evidence should not be reviewed to ascertain whether a judge would be able to resolve factual issues, but rather whether their defence is doomed to fail.
- [17] Walter and Tony argue that the evidence raises genuine triable issues with regard to the following matters, all of which will require a full trial to resolve:
- a) the petitioner's expectations, summarized as follows, are not reasonable:
 - i. the petitioner's expectation to manage WHL and serve as a director;
 - ii. the petitioner's expectation to shareholder's dividends; and
 - iii. the petitioner's expectation to audited financial statements;

- b) the applicant's conduct has not been oppressive and/or unfairly prejudicial;
- c) WHL did not historically operate as a quasi-partnership; and
- d) there is no deadlock amongst the shareholders or directors.

[18] As to the merits of the petition, the petitioner, who is supported by his sister Silvia, argues:

- a) WHL is a family business and that each could expect an equal voice;
- b) the foundational basis, or substratum of the company, is broken;
- c) as a family company, it is a special category under the law and in particular, the familial nature of the business lowers the threshold for what constitutes just and equitable under s. 324 the Business Corporations Act, S.B.C. 2002, c. 27; and
- d) the parties have each previously acknowledged, as referenced in the company minutes and elsewhere, that there is a need to separate their business affairs, which the petitioner says is a unique fact not found in other authorities.

[19] Although the petitioner and Silvia argue that a trial will not be required, they submit that the petition judge will be in the best position to determine the question. They argue that although Saputo says that the Court should not weigh evidence, Saputo does not say that the Court must ignore undisputed evidence and the petitioner argues that the Court can draw inferences from the evidence based upon reasoning and reasonable implication. They say the petition judge may be able to draw inferences from the evidence and grant relief.

[20] The petitioner says that this application is premature because it would not be appropriate to determine whether or not to convert when the Court has ostensibly been taken on a "flyby" of the evidence. Silvia urges that the application should be adjourned to the judge hearing the petition because as the judge hearing this application with no ability to weigh evidence, I cannot reasonably conclude that the matter cannot be determined on the evidence before the court and without a trial.

[21] I am satisfied that the court may determine a conversion application in advance of the hearing of the petition. The issue is whether I should do so.

[22] I note parenthetically that judicial efficiency, which formed a part of the applicant's argument, is of limited persuasive value here. The application to convert took two days and the petition itself is only scheduled for three days. There is no saving of judicial resources if one judge has to review all of the materials to assess the evidence, and another reviews the same evidence to weigh it.

[23] For the reasons that follow, I decline to convert the petition to an action at this time, and the question is adjourned to the hearing of the petition.

Discussion

[24] The petitioner's amended petition claims relief under both s. 227 and s. 324 of the Business Corporations Act. Section 227 provides the court with a broad discretion to grant relief if the affairs of a company have been or may be conducted in a manner oppressive to one or more of the shareholders:

227 (1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

- (2) A shareholder may apply to the court for an order under this section on the ground
 - (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
 - (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.
- (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,
 - (b) regulating the conduct of the company's affairs,
 - (c) appointing a receiver or receiver manager,
 - (d) directing an issue or conversion or exchange of shares,
 - (e) appointing directors in place of or in addition to all or any of the directors then in office,
 - (f) removing any director,
 - (g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,
 - (h) directing a shareholder to purchase some or all of the shares of any other shareholder,
 - (i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,
 - (j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,

- (k) varying or setting aside a resolution,
 - (l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,
 - (m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,
 - (n) directing correction of the registers or other records of the company,
 - (o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,
 - (p) directing that an investigation be made under Division 3 of this Part,
 - (q) requiring the trial of any issue, or
 - (r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.
- (4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.
- (5) If an order is made under subsection (3) (g), (i) or (m), the company must pay to a person the full amount payable under that order unless there are reasonable grounds for believing that
- (a) the company is insolvent, or
 - (b) the payment would render the company insolvent.
- (6) If reasonable grounds exist for believing that subsection (5) (a) or (b) applies,
- (a) the company is prohibited from paying the person the full amount of money to which the person is entitled,
 - (b) the company must pay to the person as much of the amount as is possible without causing a circumstance set out in subsection (5) to occur, and
 - (c) the company must pay the balance of the amount as soon as the company is able to do so without causing a circumstance set out in subsection (5) to occur.
- (7) If an order is made under subsection (3) (o), Part 10 applies.
- [25] Section 324 also provides the court with the power to grant relief, including in situations where the court considers it just and equitable to do so. In such cases, the court may grant any of the relief permitted under s. 227(3):

324 (1) On an application made in respect of a company that is a financial institution by the superintendent, or made in respect of a company, including a company that is a financial institution, 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.
- (4) If the court orders under this Act that a company be liquidated and dissolved, the court must, in its order, appoint one or more liquidators.
- (5) An appointment of a liquidator under subsection (4) takes effect on the commencement of the liquidation.

[26] A finding of oppression under s. 227 will often require some finding of fault, culpability, or blameworthiness. However, s. 324 requires only that the petitioner demonstrate that some relief would be just and equitable in all of the circumstances, and the authorities confirm that relief is available even in the absence of fault. As such, the petitioner has a lower bar to clear under s. 324 than he would under s. 227.

[27] In *Ten Hoeve v. Beukens*, 2020 BCSC 1194, Mr. Justice G.C. Weatherill discussed the differences between ss. 324 and 227 at paras. 44 and 45:

[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.
- [28] He then went on to address the different circumstances if the company is more akin to a partnership at paras. 46 and 47:
- [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.
- [29] In *Vivian v. Firth*, 2012 BCSC 517, Mr. Justice Fitch (as he then was), confirmed that the phrase "just and equitable" in s. 324 may apply in various circumstances, and the test may be applied more liberally in some situations than others. At para. 66 he held the following:
- [66] The words "just and equitable" are intended to be elastic in their application to permit the court to intervene to relieve against an injustice or inequity. The test may be applied more liberally in some contexts than others as, for example, in the case of a private family company where some significant disagreement has arisen including the exclusion of one family member from participation in the business: *Safarik v. Ocean Fisheries Ltd.* (1995), 64 BCAC 14 at paras. 98-103.

- [30] At para. 68, Justice Fitch went on to describe the more common categories of claims where relief is sought under s. 324:
- [68] Although the discretion to grant relief under s. 324 cannot be restricted to pigeon hole categories, the following grounds are commonly relied upon to justify judicial intervention: (1) where there is a loss of substratum; (2) where there exists a justifiable lack of confidence among the members; (3) where the parties are in deadlock; and (4) where the partnership analogy applies.
- [31] The Business Corporations Act contemplates a summary procedure. There is no principled reason why an application to convert an oppression petition into an action should be treated any differently than any other petition.
- [32] However, the mere fact that a summary procedure is contemplated does not necessarily mean that the parties' dispute must be resolved in that manner. If a trial on the merits is required, then it may be so ordered. In *Nielsen v. Nielsen*, 2015 BCSC 1622, Justice G.C. Weatherill held the following at paras. 19 and 20:
- [19] A summary proceeding is best suited for claims where the material factual underpinnings are not in dispute: *Thomas v. Thomas*, 2012 BCSC 842, at para 33.
- [20] However, the mere fact that the BCA contemplates a speedy resolution of oppression claims by way a petition proceeding on affidavits does not mean that the legislature intended that the parties would be immune from a trial on the merits if the circumstances warranted it. Rule 22-1(7)(d) provides that the court has the discretion to convert a petition to an action to be determined by way of a trial. The court will generally do so where there is a bona fide triable issue that cannot be determined by reference to the documents and would affect the outcome of the proceeding. The threshold is low: *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701 at para. 48; *Canadian Western Bank v. 0777419 B.C. Ltd.*, 2009 BCSC 683 at para. 30.
- [33] The Court went on to hold the following:
- [21] The factors to be considered include the undesirability of multiple proceedings; the desirability of avoiding unnecessary costs and delay; whether the particular issues involved require an assessment of the demeanour and credibility of witnesses; the need for the court to have a full grasp of all the evidence and whether it is in the interests of justice that there be pleadings and discovery in the usual way: *Haagsman v. British Columbia (Minister of Forest)* (1998), 64 B.C.L.R. (3d) 180 at para. 46 (S.C.); *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627 at para. 39

- [34] In addition to the five factors referred to in para. 21, there is an additional factor, as identified by Madam Justice Gropper in *Shariff v. VI Fitness Centres Inc.*, 2016 BCSC 2037 [Shariff] at para. 26, which is ". . . whether the determination to convert can be made at an early stage as to whether the oppression claims can be properly tried by way of the summary proceedings contemplated by the statutory framework".
- [35] Both parties took me through extensive references to both evidence and legal authorities that I anticipate would constitute a significant part of their submissions if the matter proceeds by way of petition as currently scheduled.
- [36] The evidence on this application fills four binders. It is inevitable that there are differences in the various parties' versions of events. Counsel for Walter took the Court through numerous aspects of the affidavits that touch upon the evidentiary conflicts, focusing on the three primary categories of allegations advanced by the petitioner.
- [37] First, Walter says that it would be unreasonable for the petitioner to expect that he would continue to manage WHL and serve as a director when there are factual disputes surrounding his termination that have not been resolved, and more importantly that he cannot be heard to complain about his exclusion as a director when he commenced litigation against the company.
- [38] Walter also points to evidence that would indicate that although WHL is a family business, operations have been managed by different family members at different times. For example, Walter was responsible for day-to-day management for a time before he was ousted and replaced with the petitioner in approximately 2006. Walter says that the petitioner cannot reasonably expect to be involved in management when the company has a history of excluding one sibling or another at different times.
- [39] Second, in answer to the claim that the petitioner had a reasonable expectation of dividends, Walter's evidence includes corporate records that indicate that no dividends were ever paid to anyone until 2019, and therefore no reasonable expectation could be established.
- [40] Finally, with regard to audited financial statements, Walter points to corporate records that confirm that WHL did not have the money to pay for audited statements for a period of time, and that a lot of business records were previously destroyed by a former employee.
- [41] The applicant also points to numerous director's resolutions that show that WHL continues to function, that the parties agree at least on some matters, and that the voting patterns as amongst the directors has not led to a stalemate or deadlock. Sometimes the vote is three-to-one with the petitioner in the minority, and on other occasions, votes of the directors, of which there are three, will sometimes be unanimous and on other occasions are a two-to-one vote but it is not always the same director in the minority.

- [42] Walter argues that he ought to be permitted to avail himself of the discovery of documents and examination for discovery processes that are only available if the matter is converted to an action. However, he does not point to any specific examples of documents that he needs but does not have, nor to any factual assertions he needs to test through cross-examination.
- [43] The issue on whether or not the petition needs to be converted to an action is not simply a matter of identifying contested factual issues. Not every disputed fact necessarily requires a trial. In *Ghag v. Ghag*, 2021 BCCA 106 [Ghag], Madam Justice Griffin held the following at paras. 43 and 44:
- [43] Even applying the test derived from the summary judgment context, mere evidentiary conflicts alone will not preclude a decision on a petition. Instead, an evidentiary conflict will only prevent judgment if it relates to a material fact or raises a triable issue: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 11.
- [44] As noted in *Lameman*, each side must put its best foot forward at the hearing. The chambers judge is permitted to make inferences of fact that are strongly supported by the undisputed facts. Further, a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 31.
- [44] One factual issue in this case that is clearly disputed, but may not be significant, provides an example of how the petition judge may be able to decide the matter despite the factual dispute.
- [45] When the petitioner was ousted from the company in 2011, he commenced a wrongful dismissal action which then led to his removal as a director in 2013. The wrongful dismissal action remains extant, even though it has not been moved forward. The petitioner has still not been elected as a director because of the outstanding claim. The defence to the underlying claim for wrongful dismissal is that the company had cause for the dismissal.
- [46] If the claim were based solely on allegations of oppression under s. 227 of the *Business Corporations Act*, the question of whether or not the company had cause to terminate the petitioner could be important. However, in the context of a claim for a just and equitable winding up under s. 324 involving a family company, the considerations are different.
- [47] Whether a corporation is akin to a partnership or to one with arm's length shareholders does not require the court to place it in one category or the other. In terms of where to place WHL on the continuum, I note there is at least some evidence from the three siblings who have given evidence, the petitioner, Walter and Silvia, which would suggest that it is a family business with some concomitant expectations, including an email authored by Walter during a period when he was excluded. It may be that the judge hearing the petition will be able to determine the reasonable expectations of the parties including the petitioner, from the affidavits already filed.

[48] In *Safarik v. Ocean Fisheries Ltd.*, 1995 CanLII 6269, 12 B.C.L.R. (2d) 1 [Safarik], the facts were similar to here. The company had been set up by a father who later brought his two sons into the business. One son was subsequently ousted. The Court of Appeal upheld the trial judge's decision to order a winding up. Madam Justice Southin writing for the majority, summarized the different considerations that apply in family companies, and concluded that relief can be ordered even in the absence of wrongdoing at paras. 99 - 103:

99 In the matter of shareholdings, the father did treat the respondent fairly and equitably. But in a company with no history of paying dividends, shares are in reality worthless unless they can be realized.

100 Family companies are very different from non-family companies. They are different because, usually when a young man joins his father in the business, he does so trusting his father to do right by him and the father intends to do right. Thus no contracts are drawn up. It is not unusual for differences to arise as they did here, not because either father or son is dishonourable but because each sees the world through different eyes.

101 If this were not a family company, but a company in which the respondent had simply bought his common shares and in buying them had decided not to be a director for whatever reason, there would be no case for an order under s. 295(3).

102 But, in my opinion, 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.

103 Taking such an approach, I am of the opinion that it is just and equitable to wind up this company. I do not found this conclusion on any of the learned judge's findings which may be said to amount to findings of "wrongdoing".

[49] I do not accept the applicants' suggestion that the decision in *Safarik* is an 'outlier'. While reasonable expectations of a shareholder will not necessarily justify a winding up in a company that is not found to be a 'quasi-partnership', *Safarik* is appellate authority and is often cited by courts in this province.

[50] I am satisfied that the petition judge may conclude that it is just and equitable to afford the petitioner a remedy as contemplated in s. 324, simply because the petitioner has been excluded from management for approximately nine years. It is incontrovertible here that there has been a breakdown of trust and confidence, certainly as between the petitioner and Walter. The fact of the petitioner's exclusion is not a disputed fact, and it may be that the petition judge would conclude that his exclusion justifies a remedy, even without assigning blame, as happened in *Safarik*.

- [51] I have concluded that a judge hearing the petition of this matter may be able to come to a decision based on the record that was before me and without the need for a trial. Put another way, while there are facts that are in dispute, I am not persuaded that any of those disputed facts are sufficiently material so as to render the matter incapable of disposition.
- [52] It may be that the judge who hears the petition may conclude, after a more thorough review of the evidence than was undertaken before me and upon more detailed submissions, that there are material facts that need to be resolved and that a trial process is the only method of accomplishing a just and proper resolution of the dispute. It may also be that something less of a full trial may be appropriate: Ghag, at para. 42; Sharif, at paras. 50 - 53. However, that is a matter for the judge hearing the petition.
- [53] As a result, I am not prepared to grant the applicant's application, but the applicant may make the same argument before the petition judge and the application therefore stands as adjourned.

Conclusion

- [54] The application is adjourned, and may be renewed before the judge hearing the petition. The application respondents are entitled to their costs in the cause.

"Wilson J."

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