

CANADA / JUDGMENT

Weisstock v. Weisstock

2022 BCSC 1886

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1886 Weisstock v. Weisstock

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Weisstock v. Weisstock,

2022 BCSC 1886

Date: 20221028

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 the Willy and Maria Concetta Weisstock Trust)

and Islandview Country Estates Ltd.

Respondents

Corrected Judgment: The text of the judgment was corrected

on the front page on November 1, 2022

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

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Place and Dates of Trial/Hearing:

Kelowna, B.C.

March 29-31, April 1,

June 20-22, 2022

Place and Date of Judgment:

Kelowna, B.C.

October 28, 2022

Introduction

- [1] Witmar Holdings Ltd. ("WHL") is beneficially owned by the petitioner ("Albert") and the three personal respondents ("Walter", "Tony" and "Silvia"). They are the adult siblings and the children of Willy Weisstock ("Willy") and Maria Weisstock ("Maria").
- [2] Albert seeks relief under either s. 227 or s. 324 of the Business Corporations Act, SBC 2002, c. 57 [BCA]. Specifically, he seeks to have the assets of WHL divided or the company liquidated.

- [3] WHL is the creation of Willy and Maria and owns an accumulation of real estate including apartment blocks, hotels and residential housing valued at in excess of \$70 million.
- [4] Albert and his respondent brothers Tony and Walter have toxic relationships. Tony and Walter oppose the petition.
- [5] Silvia has maintained amicable relations with all of her brothers. She supports Albert's application for relief pursuant to s. 324 of the BCA.
- [6] For the reasons that follow, I conclude that the basis for an order for relief pursuant to s. 324 has been made out.

Background

- [7] Prior to 1981, Willy and Maria began acquiring real estate assets. They formed WHL in 1981 and transferred the assets into it. Their division of responsibilities and the specific manner in which they carried out the evolving enterprise is not in evidence.
- [8] Their children became shareholders at a later date.
- [9] Each of Tony, Walter and Albert have, at times, been involved in the day to day management of WHL. In their written argument, Walter and Tony describe the management history as follows:
 - 22. Throughout WHL's history, certain Siblings have not been involved, had limited involvement, or have been excluded from participating in management:
 - (a) Silvia has lived in Saskatchewan since 1980 and has never been involved in the day-to-day operations of WHL;
 - (b) Tony did not participate in the management of WHL from approximately 1990 until the 2010s;
 - (c) Walter was terminated from WHL in November 2005 and was excluded from participating in management until December 2011; and
 - (d) Albert was terminated from WHL in December 2011 and has been excluded from participating in the management of WHL since that time.

[Footnotes omitted.]

- [10] The circumstances of and reasons for Albert being terminated was the subject of considerable focus in the arguments before me. It is referenced in the minutes of a directors meeting on December 21, 2011:

Motion to relieve Albert of all details of Witmar management and to not interfere with Witmar management or he will be asked to vacate his premises at the apartment, and to start to pay \$1000 per month rent starting January 1, 2012

By: Dad, Second: Walter. Passed

Albert, Mom against

- [11] It was at that time that Walter again assumed his management role of WHL.
- [12] Willy died in August 2012 and Maria in December 2016.
- [13] In May 2012, Willy settled the Willy and Maria Concetta Weisstock Trust (the "Trust"), which included 50 shares of WHL. Each of the siblings was made an equal beneficiary of the Trust. The Trust deed is dated May 11, 2012.
- [14] After Maria died, Island View Country Estates Ltd. ("Islandview") was founded and became the owner of 41 shares in WHL in place of the Trust. The Trust owns Islandview.
- [15] 1100748 B.C. Ltd. ("748") was also created following Maria's death and holds the WHL shares owned by Maria's estate. Each of the siblings is an equal beneficiary to that estate.
- [16] Each of Silvia, Tony and Walter have personal holding companies which hold their shares in WHL and are named as respondents.
- [17] Tony was the sole director of Islandview and 748 until May 2022. At that time all siblings became directors of 748.
- [18] The net effect of the deaths of Willy and Maria, the creation of the Trust, Islandview and 748 was to leave each of the siblings with a 25% beneficial interest in WHL.
- [19] There is or has been other litigation between the siblings associated with the companies, the estate of Maria and generally in respect of the accumulated wealth now held by them.
- [20] In December 2013, Albert commenced a wrongful dismissal action associated with his termination from the management of the company.
- [21] On February 2, 2022, Tony executed a deed removing Albert as a beneficiary of the Trust. In his affidavit #2, Albert attaches a petition that he indicates he has instructed his counsel to file challenging the validity of that deed.
- [22] In respect of this petition, the respondents sought an order that the matter be converted to an action and placed on the trial list. That application was refused by Mr. Justice Wilson (2022 BCSC 209). In that decision, Wilson J. noted as follows:
 - [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.

...

[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.
- [23] Similar arguments are advanced here.
- [24] There was also a dispute over the administration of Maria's will. The proceeding was described by Mr. Justice Milman in 2019 BCSC 517 as arising "from an acrimonious dispute between two brothers [Tony and Albert] about who should serve as executor of [her] estate." Ultimately both were passed over and Mr. James Ramsey, a retired solicitor, was appointed as executor.
- [25] Mr. Ramsey was included as a respondent in this petition. On August 9, 2022, a consent order was filed dismissing the petition as against him and discontinuing it against 748.
- [26] An additional company, Witmar Developments Ltd. ("WDL"), was incorporated by the siblings in 2014 to invest and hold real estate properties in Kelowna. WHL and WDL are described in the arguments as being closely related companies in terms of ownership, management and finances.
- [27] Silvia, Tony and Walter are WDL's current directors. On August 3, 2021, an AGM for the 2020 year was held. Silvia forgot about the meeting and did not attend. Over Albert's objections, Walter and Tony continued with the meeting and with their majority presence proceeded not to re-elect Albert as a director.
- [28] Each of Albert, Walter and Silvia have filed affidavit evidence on this application. Tony has provided no evidence.

Positions of the Parties

- [29] Albert says that the relationship between he and his brothers Tony and Walter is toxic and that they have no capacity to work together. He has been excluded from WHL's management.
- [30] He says that it has been acknowledged by all siblings that the company needs to be split in some way, but that they have been unable to reach any consensus as to how that should occur or even to agree on a process to find consensus.
- [31] Albert acknowledges that if he is not successful in respect of his application under s. 324 of the BCA that he would necessarily fail in his application under s. 227.
- [32] He says in his argument:
18. While literally seeking an immediate order of liquidation, as with Silvia it is Albert's strong preference that the siblings be given a final, defined period in which to agree upon a distribution of the Company's assets, or a similar remedy leading to their separation, in default of which there be an automatic appointment of a liquidator. [Footnote omitted.]

- [33] Albert argues that the presence of the acrimony, loss of trust, and dysfunction is undeniable. That reality, given the nature of the business, supports the conclusion that liquidation of the company is just and equitable.
- [34] Silvia supports Albert's application for liquidation pursuant to s. 324. She says the siblings fell into business together essentially by inheritance, but their family relationships are beyond any chance of repair. She finds herself stuck in the middle of the dispute between Albert on one hand and Tony and Walter on the other. She says the actions of Walter and Tony in removing Albert as a director of WDL and removing Albert as a beneficiary of the Trust epitomize the state of affairs.
- [35] She argues that Tony has used his position as director of Islandview and 748 to exercise "outsized votes" to "tip the balance at the shareholder table in favour of himself and Walter, despite the fact that all four siblings actually own exactly 25% of the Company shares beneficially". She notes that it is "remarkable" that Tony, in the circumstances, has not filed any evidence.
- [36] Her position is summarized in paragraphs 7 and 10 of her written argument as follows:
7. In this litigation, the siblings are substantively divided 50/50. On one side, Albert and Silvia are aligned in seeking a wind-up of the siblings' business relationship. On the other side, Walter and Tony have resisted that relief--at least formally--in their response to the petition.
- ...
10. Silvia's position is as follows (see detail at Part I of Silvia's response petition):
- (a) Silvia seeks a declaration that it is just and equitable for the court to provide relief pursuant to s. 324 of the Act;
- (b) Specifically, pursuant to s. 324(3)(b) and 227(3) of the Act:
- (i) The Court should enforce a negotiating period of 60 days following the pronouncement of this Order, during which Sylvia, Albert, Walter and Tony may attempt to agree upon distribution of the Company's assets among them or a buy-out of one or more of their interests in the Company or a combination of both or another agreed-upon remedy, such agreement to be filed in this proceeding as a consent order within such 60 day period;
- (ii) If Sylvia, Albert, Walter and Tony cannot reach such agreement and file such consent order within 60 days then C. Cheveldave & Associates Ltd. (the "Liquidator") will be automatically appointed Liquidator of the Company with the obligation and the sole authority to market and realize upon the Company's assets, to manage the Company in the interim, and to pay the Company's debts and dissolve the Company in due course.
- c) Costs in favour of Silvia payable by Walter and Tony jointly and severally.

- [37] The respondents Tony and Walter argue that despite the ruling of Wilson J. at 2022 BCSC 209, this petition proceeding should be converted to an action or, at a minimum, there should be an order for discovery of documents and cross-examination on affidavits.
- [38] Further, they argue that there is no evidence of any operational deadlock within the company and that the acrimony between the siblings has not interfered with the conduct of business by the company.
- [39] They say that acrimony within the family is not new and that the Court's focus on this application should be the reasonable expectations of Albert. On that issue Tony and Walter argue that Albert had no reasonable expectation to participate on an ongoing basis in the management of the company.
- [40] They say:
4. There is no cogent or compelling legal basis for the Court to impose a draconian winding-up and liquidation order in this case. Such orders are the nuclear option. They are reserved for the most extraordinary of circumstances, and appropriately so, given the magnitude of the resulting interference visited upon a private enterprise. This is not one of those cases. Many family companies have acrimony. More is required for remedy of last resort.
- [41] They characterize the positions of Albert and Silvia as seeking to use s. 324 as a mechanism to "monetize" their investment.
- [42] While they accept that a liberal approach to the interpretation of the words "just and equitable" in s. 324 of the BCA can be taken in the context of family-owned companies, they argue the vast majority of decisions indicate that remedies will only be granted where there is a loss of substratum, there exists a justifiable lack of confidence among the members, the directors or shareholders are in deadlock or the corporation operates as a quasi-partnership. They say that none of those four circumstances exist on the facts here. More specifically, their argument is summarized at para. 160 as follows:
160. Rather, on the facts of this case and pleadings filled herein, 182 there are only four potential avenues by which the Petitioner could possibly be entitled to a s. 324 remedy:
- (a) if it is established that there has been a loss of substratum;
 - (b) if it is established that WHL historically operated as a quasi-partnership and there has been a breakdown of the mutual trust and confidence upon which WHL was formed;
 - (c) if it is established that the directors and/or shareholders of WHL are in a state of operational deadlock; or
 - (d) if it is established that Albert had a reasonable expectation that he would participate in the management of WHL (the mere fact of his exclusion is not enough).

- [43] The response to the petition filed by WHL endorses the response and position of Walter and Tony. In addition, it states that if a remedy is to be granted, it should be in the form of a buyout order with time for the parties to resolve how best to implement that process.

The Law

- [44] Following the commencement of these petition proceedings and the decision of Wilson J. (2022 BCSC 209), a five-member panel of the British Columbia Court of Appeal rendered its decision in *Cepuran v. Carlton*, 2022 BCCA 76. The Court considered the question of when a petition would be referred to trial. The Court said this at para. 160:
- [160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.
- [45] Whether there are triable issues that warrant conversion to an action, or the implementation of hybrid procedures such as discovery of documents or cross-examination on affidavits, must be determined in the context of the relevant legal principles arising from applications under s. 324 of the BCA.
- [46] A second decision of the British Columbia Court of Appeal delivered after the filing of this petition is *Petersen v. Hawley*, 2022 BCCA 169. The context of that decision is described as follows at para. 1:
- [1] . . . It is a real estate holding company, the most important asset of which is a property in Surrey that is rented to Mega Cranes Ltd., an operating company held by the brothers in disputed proportions. The brothers have carried on business with some success for many years, one taking on operations and sales, the other the accounting and administrative functions. Yet now they are entirely lacking in the mutual trust and confidence necessary to run Value's business; they are at a deadlock on almost every decision that needs to be taken to carry on that business; and all efforts to have one buy the other out or to otherwise resolve their situation by less drastic means than liquidation or receivership have failed. We are also told there are other proceedings, planned or pending in the Supreme Court of British Columbia, involving the parties and the governance of their companies, including Mega Cranes.
- [47] The Court of Appeal referenced the trial-level decision of Justice Branch (2021 BCSC 2348) at para. 14:

- [14] Overall, Branch J. summarized the relevant principles supported by the authorities, as follows:
- a) Equitable remedies, such as winding-up a corporation, are highly discretionary: *Dia-Kas Inc.* at para. 22; [*Boffo Family Holdings Ltd. v. Garden Construction Ltd.* 2011 BCSC 1246] at para. 151; [*Hui v. Hoa* 2015 BCCA 128] at para. 61; [*Esposito v. 304768 B.C. Ltd.* 2021 BCSC 961] at para. 9.
 - b) What is "just and equitable" in the context of a family business may be different than in the context of a conventional commercial business, and determination thereof may require a more liberal interpretation: *Safarik* at paras. 100, 102; [*Ten Hoeve v. Beukens* 2020 BCSC 1194] at para. 47; *Esposito* at para. 11; *Cote v. Milltown Marina & Boatyard Ltd.*, 2015 BCSC 2033 at para. 74; *Shasta* at para. 70; *Mioni v. Papais*, 2013 BCSC 1548 at para. 25; *Kular v. Wahlla*, 2011 BCSC 61 at para. 18; *Alleluia v. Wilson*, 2011 BCSC 666 at para. 76.
 - c) When determining what is "just and equitable", a court must consider the reasonable expectations of the stakeholders in the context and with regard to their relationship: *Animal House* at para. 57; *Esposito* at para. 9; *Kular* at para. 16; *Callahan* at para. 53.
 - d) In cases where mutual acrimony has created a situation where business partners are entirely incapable of collective decision-making, it is reasonable to infer that their intention is to terminate their business relationship: *Animal House* at para. 59.
 - e) The winding-up provisions are not a mechanism to allow a party to monetize their investment: *Boffo Family Holdings Ltd.* at para 156; *Vivian* at para. 99; [*Hull Limited v. Bean Services Inc.* 2013 BCSC 1208] at para. 95; *Sohi* at para. 104.
 - f) While a party's failure to come to the court with "clean hands" may be grounds to refuse equitable relief, such a determination falls within the discretion of the judge, and it is not an absolute bar: *Dia-Kas Inc.* at para. 22; *Sohi* at para. 57.
 - g) Where, on an application for equitable relief, neither party before the court has "clean hands", the court is not required to decipher which party bears more blame: *Dia-Kas Inc.* at para. 22; [*Suleiman v. Saffuri* (2005), 48 B.L.R. (3d) 286 (Ont. S.C.J.)] at para. 33; *Mayer* at paras. 207-209; *Shasta* at para. 6; *Kidner Investments Ltd.* at para. 76; *Mostyn* at para. 18; *Ten Hoeve* at para. 66. However, the parties' conduct may still be relevant in contextualizing the conflict or determining whether the court should use its discretion to grant relief: *Mayer* at para. 208. [At para. 61.]
- [48] The Court of Appeal confirmed that a finding of wrongdoing is not required to obtain relief under s. 324 the BCA and said this in paras. 28-30:
- [28] Although a party's conduct may well be relevant to the granting of an order under s. 324, I cannot agree that the chambers judge erred in declining to refer Mr. Petersen's petition to the trial list. First of all, this argument misses the point that Mr. Petersen was proceeding under s. 324 and not under s. 227. In other words, the question of oppression was not before

the Court: the petitioner needed only to show that it would be "just and equitable" to wind up the company. It has long been trite law that there need be no finding of oppression, or even wrongdoing, to engage what is now s. 324: see *Safarik* at para. 84; *Oakley v. McDougall* (1987) 14 B.C.L.R. (2d) 128 (C.A.) at 132-3; and the seminal case of *Ebrahimi v. Westbourne Galleries Ltd.* (1973) A.C. 360 (H.L.) at 374. There, Lord Wilberforce traced the "just and equitable" remedy to as far back as the Joint Stock Companies Winding Up Act, 1848 and then to the Companies Act 1862, noting that at least from the latter iteration, the provision has been given an exceedingly broad scope. Indeed, Lord Wilberforce observed that the tendency to "create categories or headings" under which cases must be brought if the section is to apply, is "wrong", and that "general words should remain general and not be reduced to the sum of particular instances." (At 374-5.) Like the Court in *Golden Pheasant Holding Corp. v. Synergy Corporate Management Ltd.* 2011 BCSC 173, I also note a passage from *Oppression and Related Remedies* (2004), where the author Mark Koehnen wrote with respect to the Canadian counterpart of s. 324 that:

Section 214 (of the Canada Business Corporations Act, R.S.C. 1985, c. C-44) allows the court to liquidate a corporation when it is just and equitable to do so. There are four broad sets of circumstances in which courts have commonly ordered liquidation on the "just and equitable" ground:

- loss of substratum;
- justifiable lack of confidence;
- deadlock; and
- the partnership analogy.

Although the law on just and equitable liquidation is frequently discussed in terms of these four grounds, it is important to note that just and equitable liquidation is not limited to them. The words "just and equitable" are of the "widest significance" and do not limit the jurisdiction of the court to a particular type of case. Even though some cases may describe the availability of the remedy in more limited terms, "the court must be careful not to construe the authorities as setting out a series of restrictive principles which would confine the phrase 'just and equitable' to rigid categories. Each case depends to a large extent on its own facts. [At 396-7; emphasis added by Court of Appeal; footnotes omitted.]

[29] Further, the chambers judge did discuss at some length the relevance of fault as between the two shareholders in this case. He ultimately followed *Dia-Kas* in finding that the apportionment of fault was "largely irrelevant to the practical issue of what should be done to bring the disagreement to an end" and was content to proceed on the basis that each of the parties bore responsibility in different ways for the state of conflict between them. In the judge's words, there was "fault to be shared." (At para. 75.)

[30] I share the view that a full trial would be unlikely to bring the disagreement to an end. Liquidation, on the other hand, although time-consuming and perhaps costly, will disentangle the two equal shareholders of Value and end the deadlock. It was on this basis that Branch J. exercised his discretion, and I am unable to say that he was wrong in doing so. He considered the relevant factors and did not proceed on any wrong principle. I would not accede to the first ground of appeal.

[49] From the decisions referenced on this hearing, *Safarik v. Ocean Fisheries Limited*, 1995 CanLII 6269; 64 BCAC 14, was identified as worthy of particular focus by counsel. At para. 33, the Court outlined the allegations in the statement of claim, which included:

...

14. From 1962, when the petitioner, at age 13, started working in the family fishery business after school and during summer vacations, to the present, the petitioner has spent his entire working life in the family fishery business.
15. The petitioner has worked in virtually every aspect of the family business, including in the early years, working on the processing line, cleaning up the processing plant, purchasing fish and running fish packers, and hiring staff to, in the later years, running processing plants, selling product, negotiating herring roe contracts, labour negotiations, fish price negotiations, export promotion, GATT issues, native land claims, Fisheries Council of B.C. and the Seafood Industry Policy Advisory Committee.

...

17. Over the years since its inception, Ocean was run by each of the brothers (except Douglas) having a say in management decisions. However, as their father became less active in the day to day business, Edward Jr. attempted to assert a greater and greater degree of control. Generally speaking the petitioner's father and Murray acquiesced in this. In effect Edward Jr. became leader of a "control group" consisting of their father, Edward Jr. and Murray.
18. Concurrently with the growth in his own power, Edward Jr. has sought to diminish the management role of the petitioner. This has progressed to the point where the relationship between the petitioner and Edward Jr. has completely broken down, making it impossible for them to share in the running of the family business.

[50] The Court concluded that the basis for remedies under oppression had not been established and the question of whether any remedies were available had to be determined on the basis of the equivalent of s. 324. Justice Southin referenced the "just and equitable" standard set out in s. 324 as being vague (at para. 90). She noted that the trial judge did not find that the company had operated on the "partnership principle" which led to this observation at para. 93:

93 Thus, if the only proper foundations for an order under this section, in the absence of acts or omissions in contravention of the articles of association or dishonest conduct, are deadlock, disappearance of the substratum of the company, or exclusion of a quasi-partner, this petition must fail.

[51] She allowed for an additional established foundation for a remedy under s. 324; a breach of a settled practice (at paras. 94-95) but also concluded that it did not apply to the circumstances before her.

[52] After querying, "What then is left?" (at para. 98) she noted as follows at paras. 101 to 103:

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".

[53] Also referenced in the summary of Justice Branch's decision in Petersen is the decision in *Sohi v. Best Choice Blueberry Farms Limited*, 2018 BCSC 36. Again, context is provided in para. 1 of that decision as follows:

[1] The respondent, Best Choice Blueberry Farms Limited ("Best Choice") has three owners who happen to be brothers. When they formed Best Choice in 2012, the three brothers each took a third of the shares and all three were appointed directors. They have since had a serious falling out, however. On February 3, 2015, they met as shareholders and two of the brothers, the respondents Gurdial Singh Sohi ("Gurdial") and Gurjeet Singh Sohi ("Gurjeet") voted to remove the third brother, the petitioner Yadwinder Singh Sohi ("Yadwinder"), as a director and relieve him of all managerial duties. This case is primarily about why that occurred and whether it was justified.

[54] There, the petitioner also sought oppression remedies or remedies under s. 324 as an alternative. After dismissing the application for a declaration of oppression, the Court turned to s. 324 and said this at paras. 81 and 90-93:

[81] I agree with Yadwinder that the origin of Best Choice as a partnership has a significant bearing on the brothers' legitimate expectations following its incorporation. I accept in particular that Yadwinder's expectations would have remained those of a partner - both with respect to his rights and his duties. I therefore agree with Yadwinder that the statutory conditions for the expulsion of a partner under s. 38 of the Partnership Act are instructive as to the content of his legitimate expectations in that regard.

...

[90] As Fitch J. (as he then was) put it in Vivian, at para. 64:

[64] The words "just and equitable" are of the widest significance and confer upon the court a broad discretion to make a winding-up order under s. 324 or any other order under s.227(3) it considers appropriate: *Re Rogers and Agincourt Holdings Ltd. et al.* (1977), 14 O.R. (2d) 489 (Ont. C.A.). It is not necessary to establish oppressive or unfairly prejudicial conduct to engage the panoply of remedies available under s. 324: *Samra v. Bel-Air Taxi Ltd.*, 2009 BCSC 548 at para. 92; *Golden Pheasant Holding Corp. v. Synergy Corporate Management Ltd.*, 2011 BCSC 173 at para. 56. The test does not admit of a strict categorical approach. As Lacourciere J.A. observed in *Re Rogers and Agincourt Holdings Ltd.* at p. 493, "the Court must be careful not to construe the authorities as setting out a series of restrictive principles which would confine the phrase "just and equitable" to rigid categories, for each case depends to a large extent on its own facts."

[91] Although broad, the discretion is not unbounded, but "must be exercised judicially, on a principled basis, and in recognition of the reluctance of the Court to interfere lightly in the internal affairs of a company" (Vivian at para. 67).

[92] The determination of what is just and equitable will therefore vary with the context. Although the analysis must go beyond simply placing the case into a specific category, certain kinds of situations have in the past given rise to relief under s. 324. These have been said to include the following:

- (a) loss of substratum;
- (b) a justifiable lack of confidence among the members;
- (c) a deadlock among the parties; and
- (d) the partnership analogy.

[93] Yadwinder places considerable emphasis on the latter ground. He relies heavily on the judgment of the House of Lords in *Ebrahimi*, where Lord Wilberforce suggested the following factors to guide the analysis of whether the partnership analogy is applicable:

The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

- [55] The decision in *Sohi* is noteworthy as well for its discussion of remedies and the flexibility available once it is concluded that relief is appropriate under s. 324 (at paras. 110-117).
- [56] In *Callahan v. Shasta Properties Ltd.*, 2015 BCSC 663, the Court said this at para. 81:
- [81] Considering the various authorities cited by the parties, I am satisfied that the role of the court when determining whether it is just and equitable to order the winding up of a company is to focus on the reasonable expectations of the parties, and that it is not a condition precedent to the granting of relief that the conduct of the company's affairs is being impeded. As noted by Lord Wilberforce in *Ebrahimi*, the just and equitable test is a flexible one and it would be dangerous to prescribe or limit the circumstances in which it will apply, for example by requiring that an applicant establish that the disharmony or dysfunction between shareholders is prejudicing the proper functioning of the company. That will be a significant factor for the court to consider but it is not determinative. I would add that I do not read Mr. Justice Chiasson's reference in *Hui* to the incapacitation of the company as establishing the hard and fast rule advocated by *Ted*.
- [57] The Court, in *Callahan*, relied in part on the Ontario decision in *Animal House Investments Inc. v. Lisgar Development Ltd.*, 2007 CanLII 82794 (Ont. S.C.J.) and said the following at paras. 62 and 63:
- [62] Mr. Justice Wilton-Siegel concluded that irreconcilable differences alone are not sufficient to justify a winding up order (at para. 57):

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

- [63] He went on to identify the types of circumstances that might, or might not, warrant intervention by the court:
- a) "the principle has been invoked in circumstances in which the acrimony renders the parties incapable of continuing to run a business, even if it has been profitable historically" (para. 59);

- b) "While not dispositive, the extent to which the differences prevent or, conversely, do not preclude, the possibility of business decisions being taken on an ongoing basis is a significant factor" (para. 60); and
 - c) "where the acrimony does not prevent a majority of the directors from continuing to make business decisions for the corporation a court should be reluctant to find the parties intended that the business relationship among them would terminate" (para. 61).
- [58] In the decision of Wilson J. in this case, he also referenced decisions listed in Branch J.'s summary, including the following which I find instructive:
- [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.

Analysis

[59] Although Albert seeks relief pursuant to s. 227 of the BCA or alternatively s. 324, he acknowledges that if relief is not available to him under s. 324, he would necessarily fail under s. 227. In light of this and the position advanced by Silvia, I will focus on the application pursuant to s. 324 in the reasons that follow.

[60] The hearing of this petition involved extensive materials and submissions. In addition to seven days of submissions, I was provided with 59 authorities. I have endeavoured to set out the most salient comments from those authorities in respect of the principles associated to the application of s. 324. Others which I do not specifically refer to provide fact specific examples of the application of those principles.

- [61] Taken collectively and considering the section's use of the phrase "just and equitable", I find the elasticity in the interpretation of s. 324 referred to by Justice Fitch in *Vivian v. Firth*, 2012 BCSC 517, and the broad discretion referred to in *Ten Hoeve v. Beukens*, 2020 BCSC 1194, by Justice G.C. Weatherill, to be central characteristics of its application. It cannot be applied so liberally as to render the corporate existence illusory. To that end, limitations such precluding an effort to simply monetize an interest in the company have emerged.
- [62] It is clear that the section's use is typically connected with certain categories of circumstances: (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. It is equally clear that its application is not limited to those categories of circumstances.
- [63] The facts of this case, like all cases, are unique. Among them is the path by which the siblings find themselves where they are. The business that the company operates began with Willy and Maria acquiring real estate assets. It is not and never was a stereotypical storefront type of business or a commercial/industrial undertaking such as existed in *Safarik*. There, it was ". . . an integrated fishing, fish processing and food distribution business."
- [64] In addition, the siblings became shareholders after the company was created by their parents so there is no pre-incorporation history or conduct involving them.

Conversion to an Action

- [65] The parties have had the opportunity to and, with the exception of Tony, have filed substantial materials placing before the court a great many documents. There is nothing to suggest documents relevant to these petition proceedings have been withheld by any party.
- [66] A trial or even hybrid measures such as cross-examination may, and I emphasize may, allow the trier of fact to better understand the disputes and acrimony among the siblings. It may allow the trier of fact to draw conclusions about the effectiveness of Walter, Tony or Albert's management of the company under their respective tenures. It may allow the trier of fact to conclude some corporate decisions were "wrong". It may allow conclusions to be made as to who, if anyone, is at fault for the current state of relations between the siblings.
- [67] At least two realities must be recognized in respect of those possibilities. First, hindsight assessments can be informative, but such assessments are just that-hindsight. Many corporate decisions or strategies would be different if the future were known at the time.
- [68] Second, even if conclusions could be drawn, they would not be of assistance in regard to the application of s. 324.
- [69] There are within the affidavit material many accusations. In the summary of principles contained in *Petersen* (para. 46 above) reference is made to the following quote from *Dia-Kas Inc.* at para. 22; "Where, on an application for equitable relief, neither party before the

court has "clean hands", the court is not required to decipher which party bears more blame." The Court of Appeal endorsed Branch J.'s conclusion there that a full trial would be unlikely to bring the disagreement to an end (para. 30). I have no doubt that conclusion applies in this case.

- [70] In light of these realities, converting this matter to a trial or directing discovery processes or cross-examination is not warranted here and I decline to do so.
- [71] I would not reach the same conclusion in the context of the application under s. 227 for a finding of oppression.

Should a remedy be granted under s. 324 of the BCA

- [72] At its core, the issue is relatively simple. Do the circumstances here fall within any of the common grounds relied on to justify judicial intervention, and, if not, is the phrase "just and equitable" sufficiently elastic to permit the court to intervene here, particularly in light of the fact that this is a private family company?
- [73] The manner in which the company has operated historically is described in part, by Walter in his affidavit #1 at paras. 20, 21 and 56 as follows:
20. By way of a general overview, my parents built Witmar and ran the Company in the early years. They managed everything without input from me and my siblings. Over time, my siblings and I became involved in the Company in various roles and eventually took over the day-to-day operations from my parents. Our roles changed over time based on the Company's needs, family dynamics, and ultimately my father's wishes. As the siblings became more involved, there have been times where certain siblings have not been involved in running Witmar, or have even been excluded from participating in its management, including myself.
21. The family never had written agreements for our various roles at Witmar. The business always operated on the basis that family members were fairly compensated for their contributions at any given time, and our contributions varied over time based on our respective desire to be involved in the business and the family's decision as to who would be involved, which ultimately was driven by my parents. When someone has not actively participated in managing Witmar, they did not receive any form of compensation from the Company.
- ...
56. Witmar has always been a family run operation, which for most of its history has been run in a very informal manner. Until I took over in December 2011, the family never had formal directory or shareholder meetings. Rather, we would talk about the business around the dinner table at irregular intervals, and the family members tasked with the managing [of] the Company would have more frequent discussions. For the most part, directors' and shareholders' meetings were not documented, quorum wasn't followed, and most of the

family's business was carried out by shareholders' and directors' resolutions that came about without formal meetings and discussions.

Loss of Substratum

- [74] The loss of substratum refers to the original purpose of the company's business being exhausted. Tony and Walter say that purpose was to manage and hold real estate on behalf of the sibling shareholders and that purpose continues. Albert and Sylvia assert that the family relationship is the basis for the company continuing and those relationships are irretrievably damaged.
- [75] In my view, what has occurred here does not amount to a loss of the substratum. While it is true that the original intention and expectation appears to have been that the family and ultimately the siblings would operate informally and by consensus, that is not what is intended to be captured in this category. The relevance of that intention and expectation in other contexts is discussed below.

Deadlock

- [76] Tony and Walter argue that there is "no actual evidence of deadlock amongst the shareholders or directors that would justify the drastic equitable remedies sought in the petition." Walter and Tony's argument references a series of votes furthering business activities as evidence in support of this submission. The majority of those involved Tony, Walter and Sylvia voting together and Albert voting against.
- [77] It is accurate to say that the company is able to continue its business of owning and operating the real estate holdings. It is of note that the list of examples referenced by Walter and Tony includes one where Sylvia and Albert voted in favour of the appointment of three outside directors of WHL and Tony and Walter voted against. That occurred at the December 2019 annual general meeting of WHL. While the fact that motions are made and defeated can be described as part of the ordinary operations of a company, this example is symptomatic of the underlying conflict regarding the control of the company.
- [78] Sylvia's perspective on this issue is, as a result, particularly relevant. In her argument at paras. 6, 7 and 40, she states:
6. The acrimony between Albert on the one hand and Walter/Tony on the other is longstanding and well-documented in the petition record. Their hostility has grown worse in recent months, as evidenced by the fact that Walter and Tony recently removed Albert from the board of a closely related company (Witmar Developments Ltd.) in questionable circumstances; and, in an extremely prejudicial move, Tony removed Albert as a beneficiary under the family trust, thereby seizing a number of Albert's shares in the Company (all discussed further below).

7. In this litigation, the siblings are substantively divided 50/50. On one side, Albert and Silvia are aligned in seeking a wind-up of the siblings' business relations, On the other side, Walter and Tony have resisted that relief--at least formally--in their response to [the] petition.

...

40. Lastly, as explained in Albert's second affidavit, Tony has been using his position as director of two holding companies tied to the [above-noted] trust and estate--Islandview Country Estate Ltd. and 1100748 B.C. Ltd., respectively--to exercise outsized votes at the Company level. Tony's conduct in this regard has been ongoing during this proceeding. This is prejudicial to Albert and Silvia. It enables Tony (who is acting as a fiduciary, no less) to tip the balance at the shareholder table in favour of himself and Walter, despite the fact that all four siblings actually own exactly 25% of the Company's shares beneficially.

Affidavit #2 of Albert Weisstock, Tab 10 at paras 16-20 and Exhibits "B" and "C"

[79] I have noted that there are separate proceedings which will scrutinize the legality of Tony's actions in the Trust. I will not purport to make any summary determination of those issues here. Rather, the fact that those actions alters the siblings' de facto influence on the company's decision making and occurred at the very time the petition was to be heard is again symptomatic of that underlying conflict.

[80] I would add that no party suggested that this petition could not be dealt with because of any other outstanding proceedings, nor do I view that to preclude dealing with the s. 324 claim.

[81] Sylvia is not at the center of the dispute between her brothers. She has played a role of peace keeper, but is no longer able or willing to do so. Her perspective informs the analysis of the deadlock arguments.

[82] In summary, I agree that there is not an operational deadlock but the broader state of governance no longer incorporates the informal operation by consensus as described in Walter's own affidavit. The formalities of corporate governance are relied on to prevent a de-facto operational deadlock. It also serves to eliminate the operational deadlock that would otherwise exist if the informal operation by consensus model that the siblings began with continued.

Justifiable lack of Confidence

[83] The authorities reference this as a standalone category of circumstances where a remedy under s. 324 may be available. This is distinct from elements of the partnership analogy category which are described using similar language. Specifically in Vivian, Fitch J. noted one of the conditions to be satisfied for relief under the partnership analogy was "... a breakdown of the mutual trust and confidence upon which the original undertaking was founded" (para. 98). He went on to also point out that "... "justifiable lack of confidence" has been recognized as an independent ground potentially warranting a winding-up order": Palmieri v. A.C. Paving Co. at para. 26.

[84] Here, none of the parties specifically addressed this category. Walter and Tony advanced their argument as to a breakdown of the mutual trust and confidence as an aspect of the partnership analogy.

[85] As a result, I do not intend to consider this category in this decision.

Partnership Analogy

[86] Tony and Walter also argue that the company is not, in substance, a partnership and that there has not been a breakdown in the mutual trust and confidence upon which the original undertaking was found. Their written argument puts it as follows at para. 168:

168. As set out above at paragraphs 61 to 69, the Petitioner has not discharged his onus of demonstrating either that WHL operated as a quasi-partnership or that there has been a breakdown of the mutual trust upon which such a partnership was formed. In summary:

- (a) The evidence does not support a finding that WHL is in substance a partnership:
 - (i) WHL was not a pre-existing partnership that was converted into a limited company. Rather, WHL was incorporated by Maria and Willy, not the Siblings, and Maria and Willy were the sole directors and held the only voting shares in WHL for more than a decade after incorporation.
 - (ii) None of Albert, Walter, or Silvia or Tony has at all materials times been active participants in the operation of the business. Rather, different family members were involved in or excluded from the management of WHL from time-to-time, as decided by the acting directors at the time.
 - (iii) The Petitioner himself has insisted that the shareholders of WHL observe corporate formalities such as producing audited financial statements.
- (b) In any event, there has not been a breakdown of the mutual trust and confidence upon which the original undertaking was founded:
 - (i) three of the four class "B" shareholders in WHL (Silvia, Walter, and Tony) have voted together on most important issues since 2011;
 - (ii) any acrimony between Albert and the other shareholders has not prevented WHL's directors and shareholders from moving the current operations of WHL forward without his support; and
 - (iii) despite their differences the Siblings have proven they are capable for working together on important issues, including, most recently, in late 2021 and again in 2022, when they unanimously agreed to list and sell the Lutheran Church Property.

[Footnotes omitted.]

[87] The partnership analogy does not require that the business was in fact a partnership before being incorporated. In Vivian, the Court described the concept at paras. 73 and 80:

[73] References to "quasi-partnerships" or "in substance partnerships", while a convenient shorthand way of describing the circumstances in which it may be appropriate to apply the kind of equitable considerations that govern the dissolution of partnerships to applications to wind-up the business of a company, may be misleading. The Court is not engaged in a labelling exercise in determining whether a partnership analogy is appropriate, but in an assessment of a constellation of factors that may, as between one person and another, make it unjust to insist on a strict application of legal rights. Lord Wilberforce put it this way in *Ebrahimi v. Westbourne Galleries Ltd.*, at p. 500:

The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to 'quasi-partnerships' or 'in substance partnerships' may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable' sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in the company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.

...

[80] In summary, on an application under s. 324 of the Act for winding-up order, the equitable intervention of this Court on the "partnership analogy" ground requires the satisfaction of two conditions, both of which were explained by Coultas J. in *Paulson v. Dogwood Holdings Ltd.* in this passage:

... firstly, the existence of an undertaking that is in substance a partnership in the guise of a private company, and secondly, a breakdown of the mutual trust and confidence upon which the original undertaking was founded.

- [88] Here the specific responsibilities of Willy and Maria and operational characteristics of the business before their children became involved is not clear. They were spouses who acquired various real estate assets over time and incorporated part way through that process.
- [89] Walter's description in his own affidavit of the operation since the siblings became shareholders includes some of the characteristics described in Vivian. The association was formed or continued on the basis of personal relationships, involving mutual confidence. Although not always involved in the day-to-day affairs of the company, Walter describes decisions being made around the dinner table with the siblings then involved in the day-to-day management assuming the task of implementing those decisions. That affidavit evidence does indicate at least an understanding that all of the shareholders could, if they were inclined, participate in the conduct of the business at the shareholder and/or director levels.
- [90] The articles of WHL do contain "restrictions on the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere". Clause 26 is titled "Prohibitions". Clause 26.3 reads as follows:

26.3 Consent Required for Transfer of Shares or Designated Securities

No share or designated security may be sold, transferred or otherwise disposed of without the consent of the directors and the directors are not required to give any reason for refusing to consent to any such sale, transfer or other disposition.

- [91] Clause 7 is titled "Purchase or Redemption of Shares". Clause 7.1 permits, but does not obligate, the company to acquire or redeem shares.
- [92] In my view the partnership analogy does apply here.
- [93] Assessing the constellation of fact would, as between these siblings and, again, borrowing the language from Vivian above, "make it unjust to insist on a strict application of legal rights."

Reasonable Expectations

- [94] As noted above, Safarik supports a broad interpretation of the phrase "just and equitable" that is not confined to the more common categories where the courts have granted liquidation orders. Tony and Walter argue, however, that absent facts that fit into one of those categories, Safarik requires that there be an exclusion from management that is a breach of an applicant's reasonable expectations. They say that is lacking on the evidence before me. More specifically, they say this in their argument at para 197:

197. As set out extensively above and, in particular paragraphs 97 and 98, the Petitioner could not have held a reasonable expectation to be involved in the management of WHL, nor serve as its director. Unlike Safarik, where the petitioner was not excluded from management of the family company because of his conduct, incompetence or performance, here the Petitioner was terminated for mismanagement and misconduct and was not elected as a director because of misconduct and a conflict of interest.

[Footnotes omitted.]

- [95] As noted above, assessing blame or fault for the degeneration of sibling relations is not specifically relevant under s. 324. Further, differences of opinion regarding management decisions does not equal mismanagement.
- [96] What is particularly relevant is Walter's description of the role of the siblings at paragraph 56 of his affidavit. The day-to-day management is one aspect of the company's operation, but the engagement of directors and shareholders is another.
- [97] Clearly the latter has changed since the end of 2011. As noted above, Walter's affidavit confirms that the siblings' involvement in the day-to-day management has varied over time, but the role of directors and shareholders continued, as described in his affidavit, for many years until December 2011. Thereafter, and consistent with that method of operation he says in his affidavit at para. 62:
62. When I first took over management of Witmar in December 2011, Albert was still a director of the Company and was still actively participating in discussions about its direction, despite not being actively involved in the day-to-day management.
- [98] He goes on to describe various allegations regarding Albert's conduct that followed and notes that, as a result, Albert was not elected as a director at the March 2013 AGM. The minutes record that Albert and Sylvia voted in favor and Walter and Tony voted against him being a director.
- [99] The voting control acquired by Walter and Tony facilitated Albert's removal as a director by them. The interactions have become formalized, animus has flourished, and Albert is now excluded from the operations as described in para. 56 of Walter's affidavit.
- [100] The situation has simply continued to degenerate since then and has culminated in this petition.
- [101] I find it difficult to reconcile Walter's own evidence as to the traditional role of the shareholders and directors for all the years leading up to 2012 with the assertion that Albert has no reasonable expectation to be involved in, at least, the high level management and decision making by the company.

- [102] In the intervening time the siblings have discussed the prospect of liquidating or otherwise dividing the company assets. I make this observation not to support a finding of an agreement to wind-up the company that may be a foundation for a s. 324 order, but as evidence of some recognition by the siblings that a return to the status quo is unrealistic.
- [103] I do not agree with the respondents, Tony and Walter, that Albert has no reasonable expectation of being involved in the management of the company.

Conclusion

- [104] I decline to convert the petition to an action or order any hybrid procedures in the context of these petition proceedings.
- [105] In all of the circumstances, it is my conclusion that the basis for an order that the company be liquidated pursuant to s. 324 has been made out.
- [106] I find that this could be justified on the basis of, at least, the partnership analogy factors.
- [107] Although there is technically no deadlock in the day-to-day management of the company, that is a product of manipulations of voting control. Taking this into account and, based on the broad interpretation given to the phrase "just and equitable" as discussed in the cases cited above in the context of a family company, it is my conclusion that relief should be granted.
- [108] I will not proceed further and address the prospect of any remedy under s. 227. Each party has indicated that if it is determined that liquidation is justified, they wish an opportunity to work toward a solution before that is imposed on them (see paras. 31 and 42 above). In all of the circumstances, I view that as reasonable.
- [109] Since the parties have various views as to how that process should occur, I will hear further submissions on that issue. Accordingly, I ask the parties to arrange through Supreme Court Scheduling, not later than 21 days following the release of this decision, an appearance for directions as to the process for receiving submissions on the specific terms under which the parties may be given an opportunity to achieve a consensus on a process to disentangle themselves as an alternative to an order for liquidation of the company.

"Betton J."

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