

CANADA / JUDGMENT

Weisstock v. Weisstock

2023 BCCA 352

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 352 Weisstock v. Weisstock

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Weisstock v. Weisstock,

2023 BCCA 352

Date: 20230912

Docket: CA48696

Between:

Walter Weisstock and Antony Weisstock

Appellants

(Respondents)

And

Albert Weisstock

Respondent

(Petitioner)

And

Silvia Rita Gerard, Witmar Holdings Ltd., and

Islandview Country Estates Ltd.

Respondents

(Respondents)

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Hunter

The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated
October 28, 2022 (Weisstock v. Weisstock, 2022 BCSC 1886,
Kelowna Docket S127397).

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Place and Date of Hearing:

Vancouver, British Columbia

May 31, 2023

Place and Date of Judgment:

Vancouver, British Columbia

September 12, 2023

Written Reasons by:

The Honourable Justice Marchand

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Hunter

Summary:

Witmar Holdings Ltd. ("WHL") is a real estate company beneficially owned by four siblings, W, T, A and S. As a result of conflict with his brothers, A, supported by S, sought and was granted an order for the liquidation of WHL under s. 324(1)(b) of the Business Corporations Act, subject to the parties being granted an opportunity to agree on an alternative process to separate their interests. W and T appeal the liquidation order. They say the chambers judge erred in determining liquidation of WHL was "just and equitable".

Held: Appeal dismissed. A judge's determination under s. 324(1)(b) that liquidation is just and equitable involves a highly fact-and context-specific exercise of discretion that is afforded considerable deference on appeal. An applicant's failure to exhaust other legal options is not a "bar" to equitable relief under s. 324(1)(b). The judge adequately considered the drastic nature of a liquidation order in light of A and S's limited legal options.

The judge also did not err in considering the four sets of circumstances under which courts have historically found liquidation to be "just and equitable". He rejected deadlock as a ground for liquidation but appropriately accounted for the impact of the siblings' acrimony on how WHL operated.

The judge also correctly applied the "partnership analogy" and did not err in finding WHL is in substance a partnership under the guise of a private company. His findings that WHL was formed on the basis of personal relationships, involving mutual confidence, and that there had been a breakdown in mutual trust are supported by the record. He also appropriately considered the restrictions on share transfers under WHL's articles; such restrictions do not have to wholly prohibit share transfers to be relevant.

Finally, the judge did not err in finding that Albert had a reasonable expectation to be involved in WHL's high-level management, nor in his consideration of the reasonable expectations of other stakeholders.

Table of Contents

Paragraph Range

Introduction

[1] - [8]

Background

[9] - [22]

The Chambers Judge's Reasons for Judgment

[23] - [41]

Standard of Review

[42]

Legal Principles - An Overview

[43] - [53]

Analysis

[54] - [134]

Were Albert and Silvia obligated to exhaust other legal options before petitioning the court for a liquidation order?

[54] - [80]

Is there a threshold issue?

[55] - [69]

Did the judge err by granting a remedy when Walter and Silvia had not exhausted their other legal options?

[70] - [80]

Did the judge err in the exercise of his discretion by failing to give due consideration and weight to the absence of operational deadlock?

[81] - [86]

Did the judge err in law by failing to apply the correct "partnership analogy" test as a basis for making the liquidation order?

[87] - [92]

Did the judge err in mixed fact and law by finding that WHL is in substance a partnership in the guise of a private company?

[93] - [121]

Was there evidence that WHL was formed or continued on the basis of a personal relationship, involving mutual confidence?

[96] - [104]

Was there a basis for the judge to conclude there was an understanding that all siblings would be involved in management?

[105] - [114]

Were the restrictions on share transfers irrelevant?

[115] - [121]

Did the judge err in mixed fact and law by finding that Albert had a reasonable expectation to be involved in the high-level management of WHL and by failing to consider the reasonable expectations of other stakeholders?

[122] - [134]

Albert's reasonable expectations

[123] - [130]

The reasonable expectations of others

[131] - [134]

Conclusion and Disposition

[135] - [138]

Reasons for Judgment of the Honourable Justice Marchand:

Introduction

- [1] The respondent Witmar Holdings Ltd. ("WHL") is a family-run real estate management and investment company with assets of over \$70 million. WHL is beneficially owned by four siblings, the appellants Walter and Antony (who goes by "Tony") Weisstock and the respondents Albert Weisstock and Silvia Gerard. They are the adult children of the founders of the company, Willy and Maria Weisstock. For clarity and convenience, I will refer to the siblings and their late parents by their first names. In doing so, I intend no disrespect.
- [2] As a result of conflict between the siblings, Albert petitioned the court for various relief, including an order to liquidate WHL under s. 324(1)(b) of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA]. In order to obtain a liquidation order, Albert had to satisfy the court that it would be "just and equitable" to make the order. Silvia supported Albert's petition. Walter and Tony opposed it.
- [3] Following a seven-day hearing, on October 28, 2022, the chambers judge dismissed Walter and Tony's application to convert the petition into an action and ordered that WHL be liquidated. He acceded to the parties' request and made the liquidation order subject to the parties being given an "opportunity to achieve a consensus on a process to disentangle themselves as an alternative to an order for liquidation". The judge's reasons for judgment are indexed as 2022 BCSC 1886.
- [4] On December 15, 2022, the chambers judge made a further order requiring the parties to file and serve written submissions regarding the process by which they would separate their interests in WHL. However, before the parties had done so, Walter and Tony applied for and were granted a stay of the judge's October 28, 2022 order: 2023 BCCA 18.

- [5] On appeal, Walter and Tony do not take issue with the judge's dismissal of their application to convert the petition into an action. They submit however that the chambers judge erred in granting the liquidation order. More specifically, they say he erred:
1. in mixed fact and law, by making a liquidation order when Albert and Silvia had not first exhausted other legal options available to them to separate their interests without the court's intervention;
 2. in the exercise of his discretion, by failing to give due consideration and due weight to his own factual finding that there was no operational deadlock;
 3. in law, by failing to apply the correct "partnership analogy" test as a basis for making the liquidation order;
 4. in mixed fact and law, by finding that WHL is in substance a partnership in the guise of a private company; and
 5. in mixed fact and law, by finding that Albert had a reasonable expectation to be involved in the high-level management of WHL and by failing to consider the reasonable expectations of other stakeholders.
- [6] Not surprisingly, WHL, which is controlled by Walter and Tony, supports the submissions made by them.
- [7] Albert and Silvia's submissions are aligned. They submit that Walter and Tony "advance a formulaic 'pigeon-hole' approach that is roundly rejected in the authorities." They say the judge correctly applied the applicable legal principles in determining that it was just and equitable to liquidate WHL. They argue that there is no basis to interfere with the discretionary order of the chambers judge.
- [8] For the reasons that follow, I would dismiss the appeal.

Background

- [9] Willy and Maria began purchasing commercial real estate in Kelowna in 1972. They incorporated WHL in 1981 and transferred their commercial real estate assets to it. Willy and Maria were initially the only shareholders of WHL, each holding 50% of the issued Class "A" shares.
- [10] In 1992, WHL issued an equal number of Class "B" shares to each of Albert, Walter, Tony and Silvia. As a result, each of them held 12.5% of the shares in WHL. Each was also made a director. Willy and Maria remained the only voting shareholders until 2005 or 2006, when the siblings' shares became voting shares.

- [11] Over the years, the siblings have had varying degrees of involvement in the management of WHL. Of note, Walter was terminated from his management position with WHL in 2005. He subsequently had no role in management until 2011. At that time, Albert was terminated from his management position and Walter resumed his management responsibilities.
- [12] In May 2012, Willy, ill with cancer, settled the Willy and Maria Weisstock Trust (the "Trust") and transferred his 50 Class "A" shares to the Trust. The Trust was to be used for Maria's benefit during her lifetime. After her death, each of the siblings was to be an equal beneficiary of the Trust--unless one of them commenced or became involved in legal proceedings against the Trust, the trustee or WHL, in which case the trustee was empowered to remove that person as a beneficiary. Tony was named trustee and continues to hold that position. Willy died in August 2012.
- [13] WHL held its 2012 annual general meeting ("AGM") on March 14, 2013. Albert was not elected as a director for 2012-2013. It was the first time one of the siblings was not elected to serve as a director. The siblings' votes were equally divided (Albert and Silvia for and Walter and Tony against) but Tony voted the Trust's shares to defeat Albert's election. That voting pattern has continued and Albert has not been elected a director since.
- [14] In 2013, Albert commenced a wrongful dismissal action against WHL. Besides issuing pleadings, Albert's action was dormant until he discontinued it on March 28, 2022 (the day before the petition hearing).
- [15] In 2014, the siblings incorporated Witmar Developments Ltd. ("WDL") to invest in and hold real estate in Kelowna. Initially, all of the siblings were made directors of WDL but Silvia inadvertently failed to attend the 2020 AGM, held on August 3, 2021. Over Albert's objections, Tony and Walter used their majority to elect only themselves and Silvia as directors. Albert was not elected as a director and that remains the case to the present.
- [16] In 2016, Maria died. Each of the siblings is an equal beneficiary of her estate. Albert and Tony were named co-executors but they were unable to get along and litigation ensued. Ultimately, the court passed over both Albert and Tony as executors on the basis of deadlock and conflict of interest. The court instead appointed a recently retired lawyer named James Ramsay as executor. The court's reasons for judgment are indexed as *Weisstock v. Weisstock*, 2019 BCSC 517.
- [17] After Maria died, two companies were created for tax-planning purposes. Islandview Country Estates Ltd. ("Islandview") was founded by the Trust and became the owner of 50 Class "A" shares in WHL on behalf of the Trust. 1100748 B.C. Ltd. ("748") was founded to hold the 50 Class "A" WHL shares owned by Maria's estate. WHL then repurchased 14 shares from Islandview and 9 shares from 748 leaving Islandview with 36 and 748 with 41 Class "A" shares respectively.
- [18] Tony is the sole director of Islandview. Initially, he was also the sole director of 748. However, in May 2022, Mr. Ramsay made all of the siblings directors of 748.

- [19] As noted by the chambers judge, "[t]he net effect of the deaths of Willy and Maria, [and] the creation of the Trust, Islandview and 748 was to leave each of the siblings with a 25% beneficial interest in WHL": at para. 18. However, less than two months before the hearing of the petition, Tony executed a deed removing Albert as a beneficiary of the Trust. Albert has since filed a petition challenging the validity of that deed.
- [20] Currently, WHL's share structure is as follows: each of the siblings holds 25 Class "B" shares; Islandview holds 36 Class "A" shares; and 748 holds 41 Class "A" shares.
- [21] Over the years, Albert and Silvia have raised the issue of selling their shares and the parties have had discussions about separating their interests. There is no shareholder agreement between the parties but clause 7.1 of WHL's Articles authorizes WHL to purchase, acquire or redeem shares in WHL from any class of shareholder. Clause 26.3 of the Articles further provides that a shareholder may not sell, transfer or otherwise dispose of their shares in WHL without the consent of WHL's directors. The directors do not have to provide a reason for denying their consent. However, neither Albert nor Silvia has ever made a formal proposal to sell their shares in the company and the parties have been unable to agree on a process to resolve their impasse.
- [22] Although the chambers judge had extensive and often conflicting affidavit evidence before him outlining the alleged misdeeds of, in particular, Albert and Tony, he found it largely unnecessary to delve into the details and make specific findings. Except as necessary for purposes of my analysis, I will likewise avoid delving into the details of the parties' acrimonious relationships. It suffices to say that there was an evidentiary foundation to support the judge's conclusion that the relationship between Albert on the one hand and Walter and Tony on the other is "toxic".

The Chambers Judge's Reasons for Judgment

- [23] After summarizing the background and the positions of the parties, the judge summarized the applicable legal principles established and/or stated in cases such as *Petersen v. Hawley*, 2022 BCCA 169 [Petersen BCCA], *Safarik v. Ocean Fisheries Ltd.*, 64 B.C.A.C. 14, 1995 CanLII 6269, *Sohi v. Best Choice Blueberry Farms Limited*, 2018 BCSC 36 and *Callahan v. Shasta Properties Ltd.*, 2015 BCSC 663 [Shasta].
- [24] The judge began his analysis by noting that the court's broad discretion to make a liquidation order under s. 324 of the BCA is not unlimited. He held:
- [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 [as] precluding an effort to simply monetize an interest in the company have emerged.

[25] The judge next referenced the four categories of circumstances that are "typically connected" to the use of s. 324, namely:

1. loss of a company's substratum;
2. a justifiable lack of confidence among the members;
3. deadlock between the parties; and
4. the partnership analogy.

[26] The judge added that the use of s. 324 is not limited to these categories and noted that the facts of each case are unique.

[27] The judge then identified the "core issue". He put it this way:

[72] 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?

[28] To guide his analysis, the judge relied on the following excerpts from Walter's affidavit #1 regarding how WHL had been operated historically:

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 director 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.

- [29] The judge next turned to consider whether any of the four typical categories for the use of s. 324 applied in the particular circumstances of the case before him.
- [30] The judge first stated that "[t]he loss of substratum refers to the original purpose of the company's business being exhausted": at para. 74. He accepted Albert and Silvia's submission that the original intention of operating WHL informally and by consensus was no longer in place, but he did not accept that this amounted to a loss of substratum. Rather, the judge accepted Walter and Tony's submission that the original purpose of WHL was to manage and hold real estate on behalf of the shareholders and that that purpose continued. The judge's conclusion on loss of substratum is not at issue on appeal.
- [31] The judge next considered whether the parties were in a deadlock. The judge first highlighted Silvia's evidence regarding the acrimony between Albert on the one hand and Walter and Tony on the other. The judge did not make any findings regarding the propriety of Tony's actions in the Trust, which were the subject of separate legal proceedings. However, he considered the fact that those actions had altered "the siblings' de facto influence" on WHL's decision making and had occurred just prior to the hearing to be symptomatic of the underlying conflict between Albert and his brothers: at para. 79. The judge also noted that Silvia, who was the only sibling to have maintained good relationships with all of her siblings, was no longer willing to play the role of "peace keeper": at para. 81.
- [32] The judge accepted that there was no operational deadlock but only because of resort to "[t]he formalities of corporate governance":
- [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.
- [33] As the parties did not specifically address the "justifiable lack of confidence" category, the judge did not consider it.
- [34] Regarding the "partnership analogy", the judge began by stating Walter and Tony's position that WHL was not "in substance a partnership" and that there had not been a "breakdown of the mutual trust and confidence upon which the original undertaking was found[ed].": at para. 86. He quoted Walter and Tony's written argument which made the following points:
1. WHL was not a pre-existing partnership that had been converted into a limited company;
 2. None of the siblings had at all material times been active participants in the operation of the business;

3. Albert himself had insisted on WHL observing corporate formalities;
4. Silvia, Walter and Tony had voted together on most important issues since 2011;
5. The acrimony between Albert and other shareholders had not prevented WHL from moving forward without his support; and
6. Despite their differences, the siblings had worked together on certain important issues, including the sale of a particular property.

[35] The judge relied on the decision of Justice Fitch (as he then was) in *Vivian v. Firth*, 2012 BCSC 517 for the proposition that "[t]he partnership analogy does not require that the business was in fact a partnership before being incorporated": at para. 87. He then quoted the following passages from *Vivian*:

[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 [a] 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.

[36] Although the nature of WHL's operations before the children became involved was not clear, the judge found that its operations since their involvement included some of the factors identified in *Vivian*. More specifically, he found:

[89] 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".

[37] After noting that WHL's articles permit but do not obligate the company to acquire or redeem shares and "[a]ssessing the constellation of fact[s]", the judge concluded that the partnership analogy applied and that it would be unjust to apply strict legal rights in the circumstances: at para. 93.

[38] The judge next reiterated that the phrase "just and equitable" is not confined to the "more common categories" and considered whether this Court's decision in *Safarik* provided a further basis to liquidate WHL. He noted Walter and Tony's contention that, unlike the applicant in *Safarik*, Albert could not have reasonably expected to be involved in the management of WHL. They submitted that he had been terminated for mismanagement and misconduct and not elected as a director because of misconduct and a conflict of interest: at para. 94.

[39] The judge rejected Walter and Tony's submissions based largely on Walter's own evidence. He held:

- [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.
- [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.
- [40] Finally, the judge concluded that "[i]n all of the circumstances the basis for an order that the company be liquidated pursuant to s. 324 has been made out." He held:
- [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.
- [41] As noted at the outset, rather than immediately order that WHL be liquidated, the judge acceded to the parties' request and gave them "an opportunity to achieve a consensus on a process to disentangle themselves as an alternative to an order for liquidation": at para. 109. Ultimately, as a result of this appeal and the stay of the judge's order, the parties have not made further submissions to the judge.

Standard of Review

- [42] In *Esposito v. Esposito*, 2022 BCCA 51, this Court succinctly stated the standard of review for decisions made under s. 324 of the BCA and its associated remedial provision, s. 227, as follows:
- [17] Decisions made under the authority of ss. 324 and 227 of the BCA involve broad exercises of discretion and are afforded considerable deference on appeal. Whether a remedy under ss. 324 and 227 of the BCA is just and equitable is a question of mixed fact and law: *M. McIsaac Family Holdings Ltd. v. Tolam Holdings Ltd.*, 2020 BCCA 371 at para. 60. The court will only interfere if the trial judge "acted on a wrong principle, gave insufficient or no weight to relevant considerations, or made a decision that is so clearly wrong it results in an injustice": *McIsaac* at para. 60 and the further authorities that are referred to.

Legal Principles - An Overview

- [43] Section 324(1)(b) of the BCA provides that a shareholder may apply to the court for an order that a company be liquidated and dissolved. It empowers the court to make such an order if the court considers it "just and equitable to do so."
- [44] If the court concludes that it is just and equitable to liquidate and dissolve a company, such an order does not automatically follow. Under s. 324(3), the court may either order the company to be liquidated and dissolved or make "any order under section 227(3) it considers appropriate." Section 227(3) provides the court with the authority (and flexibility) to "make any interim or final order it considers appropriate" to remedy or end "the matters complained of." Section 227(3) also provides a non-exhaustive list of available remedial orders.
- [45] The "just and equitable" provision allows the court to impose broad and equitable considerations to the strict legal obligations that would otherwise apply to a corporation. It permits a judge to recognize that within and behind a corporation, "there are individuals, with rights, expectations and obligations" and that sometimes this "make[s] it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way": *Ebrahimi v.*

Westbourne Galleries Ltd., [1972] 2 All E.R. 492 at 496, [1973] A.C. 360 (H.L.) at 500 (per Lord Wilberforce).

- [46] The cornerstone of the just and equitable analysis is therefore the parties' reasonable expectations. In other words, liquidation is justified where an applicant "demonstrate[s] 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": *Animal House Investments Inc. v. Lisgar Development Ltd.*, 87 O.R. (3d) 529, 2007 CanLII 82794 (S.C.J.) [Animal House ONSC] at para. 57, aff'd 237 O.A.C. 261, 2008 CanLII 27471 (Div. Ct.).
- [47] As the judge identified, historically, courts have typically found it "just and equitable" to liquidate a company in one of four sets of circumstances:
1. loss of a company's substratum;
 2. a justifiable lack of confidence among the members;
 3. a deadlock among the parties; and
 4. the partnership analogy.
- (Petersen BCCA at para. 28, citing Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at 369-97).
- [48] The authorities are clear, however, that the court's discretion under s. 324(1)(b) is not limited to these categories. The words "just and equitable" have been described as words "of the widest significance" that confer a "broad discretion" on the court to make a liquidation order in any circumstances it considers appropriate: *Vivian* at para. 64. A categorical approach to the court's jurisdiction is "wrong". While categories and illustrations are helpful, "general words should remain general and not be reduced to the sum of particular instances": *Ebrahimi* at 496 (per Lord Wilberforce).
- [49] Determining what is "just and equitable" is a fact-and context-specific exercise. For example, the test may be applied more liberally in the context of a family company than a conventional commercial enterprise: *Safarik* at para. 102; *Petersen v. Hawley*, 2021 BCSC 2348 [Petersen BCSC] at para. 14, aff'd *Petersen BCCA*.
- [50] No finding of oppression, or even wrongdoing, is necessary to ground an order under s. 324: *Petersen BCCA* at para. 28. While misconduct on the part of the applicant may be grounds to refuse equitable relief on a liquidation application, "such a determination falls within the discretion of the judge, and it is not an absolute bar": *Petersen BCSC* at para. 61 and the authorities cited there.

- [51] Where neither party comes to court with "clean hands", "the court is not required to decipher which party bears more blame": Petersen BCSC at para. 61, citing *Dia-Kas Inc. v. Virani*, 1997 CanLII 4118 (BCCA) at para. 22. The conduct of the parties may however be relevant to "contextualizing the conflict" and to whether the court should exercise its discretion to grant relief: Petersen BCSC at para. 61, citing *Mayer v. Mayer*, 2012 BCCA 77 at para. 208.
- [52] While the words "just and equitable" provide broad discretion for the court "to intervene to relieve against an injustice or inequity", the discretion has boundaries: *Vivian* at paras. 66-67. Liquidation and dissolution have been described as "drastic remedies" and remedies of "last resort": *Esposito* at para. 30. The discretion to order liquidation and dissolution "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, citing *Pasnak v. Chura*, 2004 BCCA 221 at paras. 26-28; *Paulson v. Dogwood Holdings Ltd.*, [1990] B.C.J. No. 2281, 1990 CarswellBC 1798 (S.C.). For example, s. 324 is not a mechanism to simply allow a minority shareholder "to monetize [their] investment": *Boffo Family Holdings Ltd. v. Garden Construction Ltd.*, 2011 BCSC 1246 at para. 156.
- [53] Although not in precisely the same terms, the judge set out all of these principles (and more) in his judgment.

Analysis

Were Albert and Silvia obligated to exhaust other legal options before petitioning the court for a liquidation order?

- [54] Walter and Tony contend that an applicant's failure to exhaust other legal options is a "bar" to equitable relief under s. 324(1)(b) of the BCA. In this case, they submit that the chambers judge erred by: (1) failing to consider this threshold issue; and (2) granting a remedy when neither Albert nor Silvia had exhausted their other legal options under WHL's Articles. They say that, if allowed to stand, the result in this case will promote litigation and enable shareholders to seek liquidation orders to monetize their investments. I disagree on all counts.

Is there a threshold issue?

- [55] Walter and Tony cite a number of authorities in support of their argument that an applicant's failure to exhaust all other legal options is a "bar" to equitable relief under s. 324(1)(b). But none of the authorities they cite supports their broadly stated and categorical proposition.
- [56] Cases such as *Vivian* at para. 67 and *Elliot v. Sidney and Zella Clark Holdings Ltd.*, 2022 BCSC 2077 at paras. 97, 126 stand only for the proposition noted above that the court will not lightly interfere in the internal affairs of a company.

- [57] In Vivian, relief under s. 324(1)(b) was denied because there was no operational deadlock and the partnership analogy was inapt: at paras. 81-86, 89, 92-97.
- [58] In Elliot, relief was denied, in part, because the applicants had not attempted to sell their shares as permitted by the company's Articles. The judge found that the applicants had not done so because they were "unhappy" with those procedures and were looking for the "most lucrative" way to dispose of their interest: at paras. 145, 155. As a result, the applicants' argument that there was no other way to "fairly extricate" themselves from the company was "not compelling." While the judge concluded in the particular circumstances before her that the applicants' failure to attempt to sell their shares was "virtually conclusive", she emphasized the heavily contextual analysis that led to that result: at paras. 99, 118, 126-127, 134, 163-166. She did not purport to lay down a rule of law that she had no option but to deny relief.
- [59] Walter and Tony rely on the court's statement in *S.M.P. v. S.H.P.*, 2003 BCSC 1185 at para. 74 that "a winding up is a remedy of last resort and is to be used where no other remedy is available." What they fail to mention is that this statement was made in the context of the court summarily rejecting an alternative argument made by a former spouse in a family law proceeding who did not have standing to seek a liquidation order. The statement is brief, overly broad and obiter.
- [60] Walter and Tony note that in *Re Professional, Commercial, and Industrial Benefit Building Society* (1871), L.R. 6 Ch. 856, Lord Justice Mellish stated "the Court ought not to grant a winding-up order unless it sees some plain injustice done to the members who present the Petition which cannot be avoided otherwise than by giving them the order": at 863-864. However, this statement was made in the context of the "great majority" of members as well as all of the creditors of the building society (a form of financial institution) being opposed to a winding-up order. Lord Justice Mellish was saying no more than, in such circumstances, a winding-up order should not be made in the absence of "plain injustice" to the applicants (which happened to be absent in the case).
- [61] Walter and Tony rely heavily on the leading case of *Ebrahimi*. But their own written submissions acknowledge that Lord Wilberforce only went so far as to say that the statutory regime and company's constating documents are "exhaustive" in "most" (but certainly not all) contexts. Lord Wilberforce also said that the very purpose of the "just and equitable" provision is to enable the court to "subject the exercise" of those legal obligations "to equitable considerations" (at 500). The case is largely about the wide equitable discretion that courts have to order that a company be wound-up despite, perhaps even because of, the presence of technical legal limits.
- [62] Walter and Tony also rely on *Paulson*. In that case, the applicant had made offers to sell his shares but his offers had not been made in accordance with the company's Articles: at paras. 10-11. At para. 35, the court held that as "[t]he company Articles provide a procedure for the sale of shares the Court should intervene to circumvent it only where there is clear evidence

to warrant doing so." In the result, the court refused to make a liquidation order, not because of the applicant's failure to exhaust his legal options under the Articles, but because he failed to establish either the partnership analogy or deadlock. If anything, Paulson supports Albert and Silvia. It explains that a liquidation order may be made "where there is clear evidence to warrant doing so" despite unexercised provisions in a company's Articles regarding the sale of shares.

- [63] Other cases such as *Esposito* at para. 30, *Hull Limited v. Bean Services Inc.*, 2013 BCSC 1208 at para. 78 and *Talwerdi v. Infonet*, 2001 BCSC 1304 at para. 43, describe liquidation and dissolution as "drastic remedies", "draconian" and/or "remedies of last resort". But again, none stands for the proposition advanced by Walter and Tony.
- [64] In *Esposito*, this Court upheld a liquidation order in a case where siblings with equal shareholdings acknowledged "the need for a corporate divorce": at para. 32. Further, liquidation was appropriate despite one sibling presenting a less "intrusive" option: at paras. 28, 41-43, 46-47. In *Hull Limited*, the court refused to grant equitable relief because the applicants did not establish grounds to justify a liquidation order: at paras. 88-99. Neither *Esposito* nor *Hull* was decided on the basis that the applicant had failed to exhaust all of their other legal options before seeking a liquidation order.
- [65] In *Talwerdi*, the court refused to make a liquidation order on two grounds: (1) the applicants failed to establish that the partnership analogy applied; and (2) such an order was not just and equitable "in light of the numerous alternative remedies" available to the applicants: at para. 50. But, the second ground was not based on a rule of law that required the applicants to first exhaust their alternative remedies under the shareholder's agreement (which contained a "Compulsory Buy-Out" provision). Rather, the court (at para. 43) rested its analysis in large part on the following passage from David Huberman, "Winding-up of Business Corporations" in Jacob S. Ziegel, ed., *Studies in Canadian Company Law*, vol. 2 (Toronto: Butterworths, 1973) 273 at 323:

Apart from any difficulties the petitioner may have in proving his basic entitlement to a winding-up, he is faced with yet another hurdle for, broadly speaking, the courts have been generally unwilling to grant a winding-up under the "just and equitable" rule where the petitioner has another remedy. The courts have indeed viewed the destruction of a company as such a drastic and distasteful thing that they have insisted that the remedy will only be available in circumstances where it is, in the last resort, the sole and exclusive means of affording relief.

As Lord Justice Mellish said in the case of *In re Professional, Commercial, and Industrial Benefit Building Society* [cite omitted] "the Court ... ought not to grant a winding-up order unless it sees that some plain injustice is being done to the members who present the Petition which cannot be avoided otherwise than by giving them a winding-up order.

[Emphasis added.]

[66] The court in Talwerdi then rejected the applicant's argument that he be granted a liquidation order so as to maximize his recovery, holding:

[47] The Petitioners suggest that a winding up and liquidation offers the advantage of putting the company's intellectual property on the open market, possibly resulting in a bidding war which may include [two of the respondents], and thus increasing the company's share value. In my view this consideration is not an appropriate basis for a winding up order on the just and equitable ground. The principles in Ebrahimi attempt to provide relief to a shareholder who has no legal means of extracting his or her interest from the company, not to offer the most lucrative recovery possible.

[Emphasis added.]

[67] The court reached this conclusion, in part, because the shareholders agreement "set out options and solutions that were the most likely to be fair to both sides" and was the basis of the parties' business relationship: at paras. 44-46. When read in full context, the court's statement that "[t]he principles in Ebrahimi attempt to provide relief to a shareholder who has no legal means of extracting his or her interest from the company" relates to the specific circumstances before the court. The broader reading advanced by Walter and Tony does not accord with the principles discussed in Ebrahimi on which the statement rests.

[68] As can be seen, while a somewhat helpful comparator, Talwerdi does not stand for the proposition that the court must always refuse to grant relief where an applicant for a liquidation order has another legal option.

[69] The chambers judge did not err by failing to consider the threshold issue advanced by Walter and Tony. There is no such threshold.

Did the judge err by granting a remedy when Walter and Silvia had not exhausted their other legal options?

[70] As far as the second part of Walter and Tony's submission goes, I agree that it was important for the judge to bear in mind: (1) that liquidation orders are remedies of last resort; (2) the terms of WHL's Articles; and (3) the fact that Albert and Silvia did not make a formal offer to sell their shares. On my review of the reasons for judgment, it is clear that he did so.

[71] At para. 40, the judge reproduced the following excerpt from Walter and Tony's written submission:

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.

[Emphasis added.]

- [72] He also cited many of the authorities relied on by Walter and Tony on appeal, which collectively make clear that liquidation orders are not to be made lightly.
- [73] Perhaps more to the point, in his analysis, the judge specifically referred to the provisions in the Articles regarding the sale or transfer of shares (at paras. 90-91) and to the discussions the siblings had had regarding the prospect of liquidating or otherwise dividing WHL's assets (at para. 102). There is no reason to think he overlooked the fact that Albert and Silvia had not made formal offers to Walter and Tony.
- [74] Further, the judge, correctly in my view, concluded that the Articles amounted to a restriction on the sale or transfer of shares, not a remedy. They permitted, rather than obligated, the company to acquire or redeem shares and prohibited any sale or transfer of shares without the consent of the directors (with the directors having no obligation to state a reason for withholding their consent). The restrictions in the Articles were a far cry from the remedies available under the shareholders agreement in *Talwerdi*. Moreover, the rejection of a liquidation order in the circumstances before the court in *Elliot* was based on the context-specific analysis I have described above. It did not compel the same result in the unique and distinguishable circumstances of this case.
- [75] Walter and Tony argue, however, that if they unreasonably withheld their consent to a proposed sale, Albert and/or Silvia could then come to court to pursue an oppression remedy. Respectfully, Walter and Tony do not identify an alternative remedy in the Articles, just a potential pathway to a different lawsuit.
- [76] Finally, I acknowledge that Silvia gave evidence about wanting to monetize her interest in WHL. However, she gave that evidence in the context of being a sixty-plus-year-old owner of one quarter of a valuable company who had, until very recently, derived no financial benefit from the company. (WHL declared dividends for the first time in 2020.) Silvia was clearly frustrated by the internal bickering, conflict and poor outlook for an amicable and fair resolution.
- [77] In all of the circumstances, there was no reason for the judge to isolate a line or two in Silvia's lengthy affidavit evidence and conclude that Albert had brought these proceedings as an inappropriate means of monetizing his and Silvia's shareholdings. The judge based his conclusion that a liquidation order was "just and equitable" on other considerations. The monetization of Albert and Silvia's interests was no more than the necessary result of a liquidation order (if ultimately made)--the same as any other liquidation order.
- [78] I reject the argument that, if allowed to stand, this case will encourage litigation. If anything, given the personal and financial toll associated with the parties' conflict and legal proceedings, it is a cautionary tale against initiating proceedings under s. 324(1)(b) without a very good reason for doing so.

[79] In my view, this case is but one example of a liquidation order being made in unique circumstances. The judge undertook a context-specific analysis of the available options in light of the siblings' relationships, expectations and personal situations and the structure of WHL. This case is by no means an open invitation for disgruntled shareholders to turn to s. 324(1)(b) for an easy liquidation remedy. All of the usual hurdles to obtaining such an order remain firmly in place.

[80] I would not accede to this ground of appeal.

Did the judge err in the exercise of his discretion by failing to give due consideration and weight to the absence of operational deadlock?

[81] Walter and Tony submit that the chambers judge erred in the exercise of his discretion by failing to give due consideration and due weight to his own factual finding that there was no operational deadlock at WHL. Had he done so, they say he would have found the absence of deadlock was a significant factor militating against the granting of the liquidation order. I disagree that the judge failed to give due consideration to the absence of operational deadlock and would not interfere with his weighing of this factor.

[82] The existence and extent of deadlock within the operations of a company is "highly relevant" to the question of whether a liquidation order should be made but it is "not dispositive". Acrimony and/or irreconcilable differences alone are not sufficient to justify such an order. The court will only exercise its discretion under s. 324(1)(b) to order a winding-up where the disharmony prevents the parties from making decisions collectively on significant matters affecting the business: Petersen BCSC, at paras. 37-38, 41, 42, citing Callahan v. Callahan, 2011 BCSC 40 at para. 48; Cariboo Western Lumber Ltd. v. Mochizuki et al, 2000 BCSC 1537 at paras. 45-46; Shasta at para. 81; and Animal House ONSC at paras. 57, 59-61.

[83] Walter and Tony do not dispute these principles but they say the judge made findings that were either incorrect or not supported by the record. In particular, they say:

1. Their majority shareholder status "is not the product of vote manipulations; rather it is simply the mathematical consequence of WHL's current shareholdings."
2. Albert's removal as a beneficiary of the Trust has not altered Walter and Tony's "de facto influence" on WHL's decision making. They already had majority control based on Tony's positions as trustee of the Trust and sole director of Islandview.
3. In finding that "[t]he formalities of corporate governance eliminate the operational deadlock that would otherwise exist if the informal operation by consensus model that the siblings began with continued" (at para. 82), the judge ignored the last 12 years of WHL's operations.
4. The judge conflated Silvia's evidence that the parties were "substantively divided 50/50" in this litigation with there being operational deadlock.

- [84] Respectfully, Walter and Tony's submissions miss the larger point made by the judge. The judge did not conflate Silvia's evidence regarding the parties' division in the litigation with there being operational deadlock. In fact, the judge recognized that there was no operational deadlock and rejected deadlock as a ground for liquidating WHL. Instead, without laying blame, he appropriately took account of the conduct of the parties, and the impact of their acrimony on how WHL operated, as important context to inform his decision on whether it was "just and equitable" in all the circumstances to make a liquidation order.
- [85] Whether or not Walter and Tony had "manipulated" voting or Albert's removal as a beneficiary had altered their control of WHL, the judge recognized-- as one factor--that, as a result of animus, Albert had been removed as a director and the company had moved away from its historic informal and consensus-based decision-making approach to running its business. Certainly, significant time had passed since Walter and Tony had used their voting majority to remove Albert as a director. But, there is no rule of law that dictates when the passage of time requires the court to ignore past practices or recognize a new status quo. In this case, the judge considered, as he was entitled to do, the parties' unique "path" to their current situation (see para. 63), including how the company had operated historically.
- [86] I see no error in principle in how the judge took account of the absence of operational deadlock in the exercise of his discretion. I would not accede to this ground of appeal.

Did the judge err in law by failing to apply the correct "partnership analogy" test as a basis for making the liquidation order?

- [87] As noted above, the chambers judge adopted the following test from Vivian regarding the application of the "partnership analogy":
- [80] In summary, on an application under s. 324 of the Act for [a] 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] Walter and Tony say that the judge stated the correct test but failed to apply the second part of it. More specifically, they say that he failed to consider or make any findings in connection with whether there had been "a breakdown of the mutual trust and confidence upon which the original undertaking was founded."
- [89] Walter and Tony submit that the judge should have considered issues such as: "whether there has been a failure of the shareholders and/or directors to convene meetings [no]; whether any alleged breakdown has interfered with the functioning of the company [no]; whether the company is able to operate [yes]; when the events giving rise to the complaints

occurred [long-ago]; and whether the party seeking relief is responsible for the breakdown of relations [undeniably, Albert bears significant responsibility], among other factors" (comments in square brackets added by Walter and Tony in their factum).

[90] I agree that the judge did not expressly state there had been a breakdown of mutual trust and confidence. But, reasons for judgment must be read as a whole and in the context of the issues as framed by the parties: *R. v. G.F.*, 2021 SCC 20 at paras. 69-70; *R. v. Mohsenipour*, 2023 BCCA 6 at paras. 35-39. Here, after stating the test, the judge found that the partnership analogy applied. A functional and contextual reading of the judge's reasons makes clear that he took account of relevant factors and reached the necessary conclusion that there had been a breakdown of mutual trust and confidence. In particular, he:

- was aware that the shareholders and directors continued to meet and that the company continued to operate: paras. 77, 82;
- was aware of Albert's termination from his management position with WHL in 2011, the removal of Albert as a director of WHL (effective in 2012) and Albert and Silvia's ongoing concerns, including as a result of Albert's continuing exclusion from high-level management: paras. 9-10, 78, 97-100;
- noted the parties' many cross-allegations of misconduct: paras. 69, 78, 94, 98;
- found it unnecessary to delve into the relative fault of the parties: paras. 66, 68-69;
- considered Tony's actions in removing Albert as a beneficiary of the Trust to be "symptomatic of [the parties'] underlying conflict": para. 79;
- concluded that "animus [had] flourished" and there had been a "degeneration" of the situation: paras. 99-100; and
- characterized the relationship between Albert and his brothers as "toxic": para. 4.

[91] Further, as discussed in the next section, the judge did not err in finding that WHL was founded on the basis of personal relationships and mutual confidence. The breakdown of mutual trust and confidence was therefore a breakdown of the basis on which WHL was founded.

[92] I would therefore not accede to this ground of appeal.

Did the judge err in mixed fact and law by finding that WHL is in substance a partnership in the guise of a private company?

[93] Walter and Tony submit that the chambers judge erred in mixed fact and law in concluding that the first element of the partnership analogy test as stated in *Vivian* was met.

[94] As noted above, the judge relied on paras. 73 and 80 of *Vivian* to guide his consideration of whether the partnership analogy applied. No one suggests he erred in doing so. In *Vivian* at para. 73, Fitch J. cited the following passage from *Ebrahimi* at 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.

[95] Also, as noted above, the judge concluded that each of the three factors identified in Ebrahimi was present. Walter and Tony submit the judge erred in doing so because:

1. there was no evidence that the "association formed or continued on the basis of a personal relationship, involving mutual confidence";
2. there was no understanding that all siblings would be involved in management; and
3. the restrictions on share transfers in the Articles were irrelevant.

Was there evidence that WHL was formed or continued on the basis of a personal relationship, involving mutual confidence?

[96] Walter and Tony cite Talwerdi at para. 30 for the proposition that the only two relevant time periods to consider whether WHL was formed or continued on the basis of a personal relationship are "pre-1981 (when Willy and Maria first 'formed' the association by acquiring real estate) and 1981 (when Willy and Maria 'continued' the association in corporate form)". They say the judge should not have concluded that WHL was formed or continued on the basis of a personal relationship given his findings that there was no evidence of how Willy and Maria initially carried out their "evolving enterprise" and that the "operational characteristics of the business before their children became involved is not clear": at paras. 7, 88.

[97] Respectfully, Talwerdi does not support the narrow view that Walter and Tony take of whether WHL was formed or continued on the basis of a personal relationship.

[98] As noted above, in Talwerdi, the court refused to order a winding up for two reasons, including that the applicants had failed to establish that the partnership analogy applied. In reaching that conclusion, the court relied on the terms of the parties' shareholders agreement. As I read the decision, there was no argument, let alone a finding, that the court was restricted to looking only at the parties' relationship prior to and at incorporation. Paragraph 30, relied on by Walter and Tony, was only a summary of the facts the applicants put forward as suggesting a partnership-like relationship.

- [99] Walter and Tony's incorrect interpretation of Talwerdi would impose a framework for assessing the partnership analogy under s. 324(1)(b) that is too strict. Whether the analogy is appropriate requires an "assessment of a constellation of factors" that reflects the context of each case: Vivian at para. 73. In my view, given the broad nature of the discretion at issue, there is no reason to take an overly restrictive view of the nature of the parties' relationship over time.
- [100] Further, the judge's finding that WHL was formed or continued on the basis of a personal relationship is supported by the record. Here, there was no evidence that Willy and Maria initially operated their business as a "partnership" (in the legal sense of the word)--but they were a married couple, not simply like-minded businesspeople with no personal relationship. When they incorporated WHL, they each became equal shareholders. Some years later they involved their four children in the business by giving them equal shareholdings. As noted by the judge, Walter's own evidence indicated that the business was run for many years as a "family run operation", "in a very informal manner", with business discussions occurring "around the dinner table" and family members receiving compensation according to their contributions.
- [101] Although not specifically referenced by the judge, Silvia described the business as a "vehicle for [the] children to work together to grow the company and share equally in its prosperity." And, at WHL's 2013 AGM, in opposing Silvia's suggestion that WHL sell a particular property and Albert's suggestion that the company's assets be divided among the shareholders, the minutes record the following:

Walter pointed out their parents set up and built up the assets of Witmar Holdings Ltd. so that all of the children could work together as the custodians of their life's work.

- [102] In any event, I agree with Albert and Silvia's submission that "the formal construct of the business is not the focus of the inquiry under s. 324." The judge was correct when he stated at para. 87 that "[t]he partnership analogy does not require that the business was in fact a partnership before being incorporated." He was also correct to rely on Vivian at para. 73 for the proposition that "[t]he 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."

- [103] As noted by Albert in his factum:

The family relationship is the only reason the siblings received shares. That is different to an arm's-length venture, where the owners elect to participate through their purchase of an interest on purely commercial terms, usually without regard for who the other owners might be.

- [104] With this background and these principles in mind, it was open to the judge to conclude that WHL historically resembled a partnership and had been formed or continued on the basis of personal relationships and mutual confidence between family members.

Was there a basis for the judge to conclude there was an understanding that all siblings would be involved in management?

[105] At para. 89, the judge found there was "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." Walter and Tony submit that this finding is "contrary to undisputed evidence that was before the chambers judge." I disagree.

[106] Walter and Tony rest their submission primarily on three pieces of evidence:

1. Walter's exclusion from management between 2005 and 2011;
2. the minutes of a December 2011 directors' meeting at which they say "Willy tabled a successful motion to remove Albert from his directorship and terminate him from management of WHL" and which they say "strongly suggests that Willy-- the founder and original president of WHL--held no understanding that all of his children were equally entitled to be involved in the high-level management of the company"; and
3. since 2011, WHL has observed corporate formalities.

[107] With respect to the first piece of evidence, Walter's exclusion from management was irrelevant to the judge's conclusion that all of the directors could "participate in the conduct of the business at the shareholder and/or director levels." The evidence established that Walter was terminated from his management position but remained a director. As such, he was not excluded from participating in management at the level of concern to the judge, namely at the "shareholder and/or director levels."

[108] With respect to the second piece of evidence, the minutes of the December 2011 directors' meeting do not support the contention that "Willy tabled a successful motion to remove Albert from his directorship and terminate him from management of WHL".

[109] Walter's affidavit describes the events surrounding WHL's December 2011 directors' meeting as follows:

48. In or around December 2011, my father asked me to return to Wilmar to run the Company. He told me that he was very dissatisfied with Albert's performance running Wilmar, that Wilmar was experiencing significant financial problems because of Albert's mismanagement, and that he believed Albert was stealing from the Company, all of which I believe to be true. My dad also told me, which I believe to be true as set out above, that Albert had maxed out both of Witmar's lines of credit at Interior Savings. Witmar didn't have the means to pay off those debts.
49. My father arranged for a directors' meeting at my parent's house on or about December 21, 2011. At that meeting, my father communicated to Albert that he didn't want Albert running Witmar any longer and that he wanted me to take over and to run the family business. It was discussed at length and put to a vote and everyone but Albert and my mother voted to remove Albert (including to end his compensation), reinstate me, and for Albert to start

paying rent (he was living for free in an apartment in the Old 3195 Walnut Building). Attached hereto and marked as Exhibit "Z" to this my Affidavit is a true copy of the minutes of the Witmar directors' meeting held on December 21, 2011.

[Emphasis added.]

[110] The minutes of the directors' meeting held on December 11, 2011 record the following:

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 \$1000.00 per month rent starting January 1, 2012.

By: Dad, Second Walter. Passed

Albert, Mom against

[111] As can be seen, there is no mention of "remov[ing] Albert from his directorship" in either Walter's affidavit or the minutes of the directors' meeting. This is consistent with the minutes of WHL's 2011 and 2012 AGMs, which were held on March 14, 2013 (after Willy had passed away).

[112] The 2011 AGM minutes record that all shareholders were present, with Tony representing himself and the Trust and Albert representing himself and having a power of attorney over Maria. The minutes then record that all six family members were elected as directors for 2011-2012.

[113] The 2012 AGM minutes again record that all shareholders were present, with Tony representing himself and the Trust and Albert representing himself and having a power of attorney over Maria. The minutes then record that only Silvia, Walter and Tony were elected as directors. In other words, Albert was not "remove[d] from his directorship" until a vote that took place in March 2013 (although apparently effective from 2012). Clearly, Albert was not removed as a director based on a motion tabled by Willy. Accordingly, Walter's affidavit and the relevant meeting minutes reveal nothing about Willy's understanding of his children's entitlement to be involved in the high-level management of WHL.

[114] With respect to the third piece of evidence, Walter and Tony argue that any understanding held by Albert that he could participate in the high-level management of WHL "surely ceased to exist when Willy voted to remove Albert as a director in 2011, and WHL began observing corporate formalities." As set out immediately above, Willy did not vote to remove Albert as a director in 2011. Further, in the judge's assessment of the partnership analogy, he could have but was not bound to reject the applicability of the analogy based on the passage of time since WHL began observing corporate formalities.

Were the restrictions on share transfers irrelevant?

[115] Walter and Tony submit that the restrictions on share transfers in the Articles were irrelevant because: (1) they did not make it "impossible" for Albert and Silvia to "exit the business"; and (2) Albert and Silvia's failure to formally attempt to sell their shares "is fatal to their request for equitable relief."

[116] Walter and Tony rest their first submission on para. 73 of Vivian, where Fitch J. adopted the following passage from Ebrahimi at 500, which I set out again for convenience:

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.

[Emphasis added.]

[117] Walter and Tony read the words "he cannot take out his stake and go elsewhere" as creating a rule of law that a "restriction on the transfer of the members' interest in the company" must be absolute. Respectfully, I am unable to read Vivian, Ebrahimi or any of the authorities cited by Walter and Tony in such a restrictive manner.

[118] To begin with, if Lord Wilberforce had intended to lay down a rule of law that restrictions on the disposition of shares were irrelevant unless absolute, he presumably would have said so by, for example, using words of "prohibition" rather than "restriction".

[119] In addition, cases such as Vivian, Elliot and Talwerdi all consider, correctly in my view, the presence (or absence), nature and scope of any restrictions on the disposition of shares. No such analysis would be necessary if the court were required to consider only whether dispositions of shares were prohibited.

[120] Walter and Tony's second submission essentially repeats their submission on their asserted "threshold" issue that an applicant's failure to exhaust other legal options is a "bar" to equitable relief. For the reasons already given, I do not accept their argument.

[121] I am unable to accede to their argument that the judge erred in mixed fact and law by finding that WHL resembled a partnership.

Did the judge err in mixed fact and law by finding that Albert had a reasonable expectation to be involved in the high-level management of WHL and by failing to consider the reasonable expectations of other stakeholders?

[122] Walter and Tony submit that the chambers judge erred in his approach to the question of the parties' "reasonable expectations" in two ways. They say first that Albert did not have a reasonable expectation to be a director of WHL and second that the judge ignored the reasonable expectations of others.

Albert's reasonable expectations

[123] With respect to their first argument, Walter and Tony say that Albert could not have had a reasonable expectation to be a director because:

1. he was removed as a director by the other directors, including Willy, in 2011 due to his mismanagement;
2. any subjective expectation of Albert's that was based on the historic informal and consensus-based management model ceased to exist in 2011; and
3. post-2011, Albert could not have reasonably expected to be a director when he had initiated a lawsuit against WHL and acted contrary to the interests of the company.

[124] I cannot agree with these submissions.

[125] Walter and Tony's submission that a director who is removed for misconduct cannot reasonably expect to be involved in management has some support in the authorities. As noted above, although "not an absolute bar", misconduct on the part of an applicant may be grounds to refuse equitable relief under s. 324(1)(b): Petersen BCSC at para. 61.

[126] However, Walter and Tony's reliance on Albert's alleged pre-2011 misconduct is misguided for two reasons. First, the evidence about Albert's alleged misconduct during this period was based on what Willy allegedly told Walter. Following a voir dire, the judge ruled that this hearsay evidence was admissible only for the limited purpose of articulating "the foundation for Walter's dissatisfaction with Albert's management of the company." The evidence was expressly not admitted for "the truth of the assertions of misconduct and mismanagement." Second, for the reasons set out above, the proposition that Willy participated in Albert's ouster as a director (if relevant) is not supported by the record.

[127] I have already addressed Walter and Tony's submission that Albert could not have a reasonable expectation of participating in the conduct of the business based on the company's pre-2011 informal management model. In short, the passage of time since WHL operated informally was a factor but was not dispositive. It was open to the judge to decide for himself how important the passage of time was in the context of the evidence as a whole.

[128] Walter and Tony certainly do point to concerning evidence about Albert threatening to "drive the company into the ground" and interfering with certain refinancing efforts of WHL. But, for the reasons set out above, the judge was not obliged to resolve the conflicting evidence of the parties' alleged misconduct or weigh relative fault.

[129] In my view, it is significant that Walter and Tony have not appealed the judge's dismissal of their application to convert the petition into an action. In effect, they have accepted that it was open to the judge to decide the case without resolving the conflicting evidence or making specific findings regarding Albert's alleged misconduct. This Court is not in a position to make the findings of fact now sought by Walter and Tony.

[130] Walter and Tony are also correct to note the apparent conflict of interest that would arise were Albert to be a director while also suing WHL. However, by the time of the hearing, Albert's lawsuit had been dormant for many years. Further, it was abandoned immediately prior to the hearing. In my view, it was open to the judge to note but give limited weight to Albert's wrongful dismissal lawsuit.

The reasonable expectations of others

[131] Walter and Tony say that the judge ignored their reasonable expectations and the reasonable expectations of other stakeholders. While I agree that the judge was obliged to consider the reasonable expectations of stakeholders (Petersen BCSC at para. 61), I do not agree that he erred by failing to expressly do so.

[132] First of all, the judge received extensive submissions regarding Walter and Tony's expectation that they be permitted to continue running WHL as they had been doing. The judge was not, however, obliged to refer to every piece of evidence and argument: Mohsenipour at para. 38. In my view, when the judge found that Albert had a reasonable expectation of being involved in the high-level management of WHL, he must be taken to have concluded that Walter and Tony's expectation of carrying on without his involvement was unreasonable.

[133] Second, as far as other stakeholders go, Walter and Tony focused their submission on the dozens of employees who work for WHL. The trouble with their submission is that it fails to recognize that the properties currently held by WHL will require employees regardless of who owns the properties. In all of the circumstances, the expectations of employees were not a significant or decisive factor.

[134] I am unable to accede to this ground of appeal.

Conclusion and Disposition

[135] The judge undertook a highly fact-specific analysis to determine that, in all of the circumstances, it was just and equitable to order that WHL be liquidated and dissolved. In reaching this conclusion, the judge took account of a number of factors, including:

- the family context;
- the history of WHL resembling a partnership that was operated informally and by consensus;

- the historic importance and subsequent breakdown of mutual trust and confidence between family members;
- Albert's reasonable expectation of participating in the high-level management of WHL;
- the enduring acrimony between the siblings, including their cross-allegations of misconduct, and its impact on the operation of WHL;
- the absence of operational deadlock;
- the means by which Walter and Tony exercised control of WHL to the exclusion of Albert;
- Silvia's unwillingness to continue to act as a peacekeeper;
- the siblings' discussions regarding liquidating or otherwise dividing the company assets (which indicated that a return to informal consensus-based decision-making was unrealistic); and
- the restrictions on the disposition of shares in WHL's articles.

[136] These findings were supported by the record and were therefore open to the judge to weigh within the parameters of the many authorities he reviewed in his judgment.

[137] In my view, Walter and Tony's appeal fails because it is based on a restrictive, categorical and formulaic approach to the court's broad discretion under s. 324(1)(b) of the BCA. Respectfully, their approach is at odds with the authorities and they have not identified any basis for interfering with the judge's exercise of discretion.

[138] I would dismiss the appeal, set aside the stay of the judge's October 28, 2022 order and return the matter to the chambers judge to receive submissions regarding how the parties propose to separate their interests in WHL in accordance with the order he made on December 15, 2022.

"The Honourable Justice Marchand"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Hunter"

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