IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vassilaki v. Vassilakakis,*
2023 BCSC 960

Date: 20230606
Docket: S48326
Registry: Penticton

Between:

John Vassilaki and Florio William Vassilakakis

Petitioners

And

Florio Michael Vassilakakis, George Ioannis Vassilakakis, Nicholas Vassilakakis, JPN Holdings Ltd., and Vassilaki & Sons Investments Ltd.

Respondents

Before: The Honourable Madam Justice Hardwick

Reasons for Judgment

Counsel for the Petitioners:	G. Douvelos
Counsel for the Respondents F.M. Vassilakakis, G.I. Vassilakakis and N. Vassilakakis:	J. Shields
Counsel for the Respondents JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd.:	J. Dawson
Place and Date of Trial/Hearing:	Kelowna, B.C. May 10, 2023
Place and Date of Judgment:	Kelowna, B.C. June 6, 2023

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Overview

[1] It is somewhat unusual for the Court to take issue with the brevity of materials relied upon in matters brought forward for determination in chambers. To the contrary, the judiciary is frequently drowning in a sea of binders containing thousands of pages of material that never actually gets referred to by counsel in their submissions.

[2] The laudable objectives of preparing concise and succinct materials, however, cannot overwhelm the necessity of putting forward admissible evidence upon which the Court can find the necessary facts to grant the relief being sought. Failing to do so leaves the Court in an informational vacuum whereby a fulsome consideration of a matter on its merits is frankly impossible.

The Petition

[3] This is a petition for relief pursuant to s. 227 of the *Business Corporations Act*, S.B.C. 2002 [*BCA*]. Section 227 of the *BCA* addresses complaints by a shareholder or shareholders. It is commonly known as the “Oppression Remedy”.

[4] The personal parties in this position are all related. For this reason and consistent with submissions made by counsel at the hearing of the petition, I shall refer to them by their commonly used moniker. I do so with no disrespect but for practical purposes given that four of the personal defendants share the same last name and two share the same first given name.

[5] The personal parties are:

a) The petitioner, John Vassilaki (“John”);

b) The petitioner, Florio William Vassilakakis (“William”);

c) The respondent, Florio Michael Vassilakakis (“Michael”);

d) The respondent, George Ioannis Vassilakakis (“George”); and

e) The respondent, Nicholas Vassilakakis (“Nicholas”).

[6] For context, John and Nicholas are brothers. John is the father of William. Nicholas is the father of George and Michael. William, George and Michael are thus cousins. John and Nicholas are their respective uncles.

[7] The personal parties are all shareholders in the corporate respondents, JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd. (collectively, the “Corporations”).

[8] John and William are minority shareholders in the Corporations. As particularized below, the shareholdings of the Corporations are such that John and William collectively hold 44 percent of the issued common and non-voting common shares of Vassilaki & Sons Investments Ltd. and collectively hold 44 percent of the issued class A and class B common shares of JPN Holdings Ltd.

[9] Specifically, the issued shares of the Corporations are held as follows:

Vassilaki & Sons Investments Ltd.		
Shareholder Name	**Class of Share**	**Number of Shares from Central Securities Register**
John Vassilaki	Class A Common Class B Non-Voting Common	48 48
Nicholas Vassilakakis	Class A Common Class B Non-Voting Common	48 48
Florio William Vassilakakis	Class A Common Class B Non-Voting Common	16 16
Florio Michael Vassilakakis	Class A Common Class B Non-Voting Common	16 16
George Vassilakakis	Class A Common Class B Non-Voting Common	16 16

JPN Holdings Ltd.		
Shareholder Name	**Class of Share**	**Number of Shares from Central Securities Register**
John Vassilaki	Class A Common Class B Non-Voting Common	300 300
Nicholas Vassilakakis	Class A Common Class B Non-Voting Common	300 300
Florio William Vassilakakis	Class A Common Class B Non-Voting Common	100 100
Florio Michael Vassilakakis	Class A Common Class B Non-Voting Common	100 100
George Vassilakakis	Class A Common Class B Non-Voting Common	100 100

[10] There is no shareholder's agreement for either of the Corporations. Although not actually in the evidentiary record, this point was conceded by all counsel upon the Court's inquiry during the course of submissions. I accept counsels' representations to the Court on this issue.

[11] For some unknown period of time up to and including January 23, 2023, John, Nicholas, William, Michael and George were all directors of the Corporations.

[12] On January 23, 2023 a shareholder's meeting was held. I will return to the fact that I do not have evidence about the authority on which this shareholder's meeting was called, but it is uncontested that a meeting occurred on said date. I shall thus define it as the "Meeting".

[13] At the Meeting, a vote occurred. The ultimate result of the vote was that only three individuals were elected as directors of the Corporations. Those individuals were Nicholas, George and Michael.

[14] The practical result of this vote at the Meeting is that neither John nor William have a seat at the director's table for the Corporations.

[15] This, as I will return to, purportedly does not accord with the reasonable expectations of John as a shareholder of the Corporations, thus resulting in this petition for relief pursuant to the Oppression Remedy.

[16] The petition, filed February 14, 2023, specifically seeks relief as follows:

> 1. The Respondents, Nicholas Vassilakakis and Florio Michael Vassilakakis, actions be declared oppressive as against the Petitioners.
> 2. The Respondents, not be allowed to remove any funds from the financial institutions which hold monies for the Respondents, JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd.
> 3. That the Petitioner, Florio William Vassilakakis, be appointed a director of the Respondents, JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd., in place of the Respondent, Nicholas Vassilakakis.
> 4. Costs.
> 5. Such further and alternative relief as this Honourable Court Deems just.

[17] The relief is opposed in its entirety by the personal respondents and the corporate respondents. All respondents further seek special costs of the petition.

The Oppression Remedy

[18] Section 227 of the *BCA* provides, *inter alia*, as follows:

> **Complaints by shareholder**
>
> **227** (1)For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.
>
> (2) A shareholder may apply to the court for an order under this section on the ground
>
> (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
>
> (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

> (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order
>
> (a) directing or prohibiting any act,
>
> (b) regulating the conduct of the company's affairs,
>
> . . .
>
> (e) appointing directors in place of or in addition to all or any of the directors then in office,
>
> . . .
>
> (g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,
>
> . . .
>
> (k) varying or setting aside a resolution,
>
> (l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,
>
> . . .
>
> (q) requiring the trial of any issue, or
>
> (r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.
>
> (4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

The Evidence in Support of the Petition

[19] As addressed in my overview, John and William elected to be brief in the evidence filed in support of their petition.

[20] Only John swore an affidavit and that affidavit is three paragraphs long ("John's Affidavit"). John's Affidavit provides as follows:

> 1. I am the Petitioner in this matter and as such have personal knowledge of the facts and information deposed of herein save and except where I state such facts to be on information and belief and where so stated I verily believe those facts to be true.

> 2. I have read the Petition that is to be filed at the same time as this Affidavit and under the same style of proceeding, and particularly, the facts set out in Part 2 of the Petition.
> 3. The matters in paragraphs 1 to 13 of the facts set out in Part 2 of the Petition are true.

[21] Counsel for the respondents both took issue with the wording of para. 3 of John's Affidavit. In my view, this is a red herring. John's Affidavit clearly adopts as true the facts at paras. 1–13 of part 2 of the Petition. Perhaps the use of the wording, "[t]he matters in paragraphs 1 to 13 of the facts" could have been somewhat more precise. However, there is no question that John was intending to swear to the truth of the facts contained in the petition.

[22] I also find that the fact that the preamble of John's Affidavit is based upon an affirmation and the jurat is based upon the affidavit being sworn are mere irregularities as permitted by R. 22-2(14) of the British Columbia *Supreme Court Civil Rules*.

[23] The much more substantive and significant issues for the Court with the evidentiary basis for the petition are that:

a) Portions of the petition which are affirmed/sworn to be true by John are not admissible on the basis that they are conclusory statements without the underlying factual foundation;

b) Despite what para. 1 of John's Affidavit says, the petition is primarily seeking final and not interim relief. Statements based on information and belief are thus presumptively inadmissible under R. 22-2(13) of the *Rules*; and

c) Most significantly, there are demonstrative gaps in the evidence needed to establish the factual foundation for the relief sought from this Court in the petition.

[24] Addressing what I have concluded are demonstrative gaps in the evidence, I make the following findings:

1. There is no evidence before me as to what statute or statutes the Corporations are incorporated under. In order for relief to be granted under the *BCA*, the Corporations need to meet the definition of "company" under s. 1 of the *BCA*. If one or both of the Corporations was incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [*CBCA*], relief for oppressive conduct would have to be sought pursuant to s. 241 of that legislation. Although the caselaw on this issue is essentially universal and guided by the leading decision of the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, that does not give the court roving jurisdiction to make orders without evidence clearing articulating the statutory basis relied upon;

2. There are no minutes of the meeting as are required to be kept pursuant to s. 179 of the *BCA*, or at least none tendered into the evidentiary record;

3. John's Affidavit fails to attach the existing articles of incorporation for the Corporations which establish the basic corporate governance procedures for the Corporations;

4. John's Affidavit does not contain any evidence as to whether William was actually nominated for election as a director of the Corporations at the Meeting. There is also no evidence of his eligibility to act as a director under s. 124 of the *BCA* although, absent all the other issues I have identified, I do not consider this alone to be fatal as William was a director until the Meeting and he was not removed in accordance with s. 128(3) or (4) of the *BCA*.

5. John's Affidavit does not contain any information as to the historical directorship of the Corporations. How long had John, William, Nicholas, Michael and George all been directors? Had there been a time previously when neither George nor William were directors? These are questions upon which the Court has simply no evidence;

6. The Court also has no evidence as to what authority the Meeting was called upon. Was it an annual general meeting held pursuant to the requirements of Division 6 of the *BCA*? Or was it a special shareholder's meeting? The same rules presumptively apply pursuant to s. 181 of the *BCA* unless, *inter alia*, the articles of the Corporations make other provisions. As noted, I do not know if that is the case as the articles of the Corporations are not in evidence;

7. John's Affidavit does not provide any information as to what the Corporations' operations are. The fact that there is other litigation involving some but not all of the respondents suggests they are not dormant, but it is virtually impossible to assess what a shareholder's reasonable expectations are without even basic facts as to the operations of the Corporations; and

8. Finally, there are no particulars whatsoever as to an "agreement" between John and Nicholas that each of the two brothers and their families could be involved in the decision making of the Corporations apart from the fact that it was apparently made when John and Nicholas were appointed as directors. However, I do not even know when that was. Further the language "could be involved" and "decision making" are ambiguous.

Adverse Inference

[25] Counsel for the personal respondents suggested that the Court draw an adverse inference from the failure of the petitioners to adduce additional evidence upon receiving their application response on March 10, 2023. This submission was

adopted by counsel for the corporate respondents who also raised some concerns about the evidentiary records, albeit in a less fulsome way, in their application response filed March 15, 2023.

[26] The law cited by counsel for the personal respondents certainly addresses the adverse inference issue and the relevant principles succinctly. It is also binding authority.

[27] Specifically, in *Singh v. Reddy*, 2019 BCCA 79, Madam Justice Newbury on behalf of our Court of Appeal addresses the adverse inference principle at paras. 8 and 9:

> [8] The principle is described by authors S.N. Lederman, A.W. Bryant and M.K. Fuerst in *The Law of Evidence in Canada* (2018, 5th ed.) as follows:
>
> > §6.471 In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and *would be assumed to be willing to assist that party*. In the same vein, an adverse inference may be drawn against a party who does not call a material witness *over whom he or she has exclusive control and does not explain it away*. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. [Emphasis added.]
>
> In *Thomasson v. Moeller* 2016 BCCA 14, this court summarized the principle in similar terms:
>
> > An adverse inference may be drawn against a party, if without sufficient explanation, that party fails to call a witness *who might be expected to provide important supporting evidence* if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established: *Cranewood Financial v. Norisawa*, 2001 BCSC 1126 at para. 127; *Lambert v. Quinn* (1994) 110 D.L.R. (4th) 284 (Ont. C.A.) at 287. [At para. 35; emphasis added.]
>
> (See also *Rohl v. British Columbia (Superintendent of Motor Vehicles)* 2018 BCCA 316 at paras. 1-5.)
>
> [9] As noted in *Rohl*, it is now generally accepted that the court is not required as a matter of law to draw an adverse inference where a party fails

> to call a witness. Thus in *Witnesses* (looseleaf), A.W. Mewett and P.J. Sankoff write:
>
> > A considerable number of cases now reinforce the view that there is no such thing as a "mandatory adverse inference" to be drawn where a party fails to call a witness. Rather, the question of whether to make such an inference seems to depend upon the specific circumstances, in particular whether:
> >
> > - There is a legitimate explanation for the failure to call the witness;
> > - The witness is within the "exclusive control" of the party, and is not "equally available to both parties"; and
> > - The witness has material evidence to provide; and
> > - The witness is the only person or the best person who can provide the evidence.
> >
> > Essentially, the decision to draw an adverse inference is discretionary and premised on the likelihood that the witness would have given harmful testimony to the party who failed to call him or her. In a case before a jury, where there are circumstances that support the drawing of such an inference, the trial judge should charge the jury that it is "appropriate for a jury to infer, although [jurors] are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to [a party] was an indication that such evidence would not have been favourable to [that party]. [At 2-23 to 2-24; emphasis added.]

[28] The failure in the respondents' collective argument on this point is that the missing material evidence which I have detailed above is largely if not entirely available to the respondents as it is the petitioners. The respondents know what statute the Corporations are incorporated under. The respondents have access to the articles of the Corporations. The personal respondents know if minutes exist from the Meeting. The personal respondents know whether William was nominated and presumably know if he continues to meet the relevant statutory requirements to be a director (keeping in mind he was a director up until the vote at the Meeting). This list could continue, but I would start to sound redundant.

[29] The personal and corporate respondents ultimately made a tactical decision not to lead evidence in response to John's Affidavit in support of the petition. That was their right, given the burden of proof issue which I will address below. However, *Singh* clearly does not stand for the proposition, in my view, that one can strategically elect to not adduce evidence which is almost entirely within their

knowledge and then ask the court to draw an adverse inference against the opposing party(ies) for not putting that evidence before the court.

[30] Further, the tactical decision of the personal respondents to not lead any evidence in response to John's Affidavit does leave those portions of John's Affidavit which are admissible and not conclusory uncontradicted.

[31] I will, however, return to the decision of the petitioners to proceed with the petition on express knowledge of the arguments the respondents intended to make regarding the evidence relied upon when addressing costs. They were also put on express notice that no evidence was going to be tendered on behalf of either of the personal respondents or corporate respondents as both application responses clearly state at Part 6 that the "materials to be relied upon" are the "petitioners' materials". Despite knowing this in mid-March 2023, the petitioners did not seek leave to introduce additional affidavit evidence to support the relief sought in the petition prior to the hearing on May 10, 2023.

The Reasonable Expectations Analysis

[32] Despite its statutory foundation, the Oppression Remedy is often described as an equitable remedy.

[33] In this regard, and as noted above, the leading case on the considering and applying the Oppression Remedy is the Supreme Court of Canada decision in *BCE*. *BCE* did specifically consider s. 241 of the *CBCA* but has consistently been applied by this Court for relief sought pursuant to s. 227 of the *BCA*.

[34] In *BCE* the Court unanimously held that the Oppression Remedy gives the court broad jurisdiction to enforce not just what is legal but what is fair. It is a fact-specific inquiry. Most significantly, the Court held that what is just and reasonable is judged by the reasonable expectations of the shareholders in the context and with regard to the relationships in play (see paras. 45 and 58-59).

[35] In *Dalpadado v. North Bend Land Society*, 2018 BCSC 835, Mr. Justice Brundrett of this Court provided a very concise summary of the principles established in the *BCE*. Specifically, at paras. 99–103 of *Dalpadado*, Brundrett J. stated:

> [99] The Court in *BCE* at para. 68 held that the two related inquiries in a claim for oppression are:
>
> > (1) Does the evidence support the reasonable expectation asserted by the claimant? and
> >
> > (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?
>
> [100] The Court explained the rationale behind the reasonable expectations aspect of the two-part test as follows:
>
> > [56] In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the CBCA.
> >
> > ...
> >
> > [58] First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society* at p. 343.
> >
> > [59] Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.
> >
> > …
> >
> > [61] Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the *CBCA*. It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The

> reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.
>
> [62] As denoted by “reasonable”, the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be “just and equitable” to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.
>
> ...
>
> [72] Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[101] As quoted above, the *BCE* decision sets out a list of useful factors at para. 72 in assessing whether a shareholder holds a reasonable expectation that has been breached. Those factors include general commercial practice, the nature of the corporation, the relationship between the parties, past practice, preventative steps, representations and agreements, and fair resolution of conflicting interests. Keeping in mind the context of this case, I will apply those factors here when assessing the petitioners’ complaints.

[102] As to the second branch of the test, the Court in *BCE* at para. 67 held as follows:

> [67] Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to “oppression”, “unfair prejudice” or “unfair disregard” of relevant interests. “Oppression” carries the sense of conduct that is coercive and abusive, and suggests bad faith. “Unfair prejudice” may admit of a less culpable state of mind, that nevertheless has unfair consequences.

[103] The Court further explained its reasoning as follows:

> [89] Thus far we have discussed how a claimant establishes the first element of an action for oppression — a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of “oppression”, “unfair prejudice” or “unfair disregard” of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations

> analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi*.
>
> …
>
> [93] The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see *Koehnen*, at pp. 82-83.

[36] Further at paras. 105 and 106 of *Dalpadado*, Brundrett J. states:

> [105] The *BCE* decision was affirmed in *Mennillo v. Intramodal Inc.*, 2016 SCC 51, where the Supreme Court dealt with a small road transportation company which was run informally without adherence to the technical requirements of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). The two shareholders (M and R) almost never put anything in writing and had neither a partnership nor a shareholders' agreement. One of the shareholders, M, subsequently resigned as an officer and director, and contended that the corporation wrongly stripped him of his status as a shareholder. His oppression claim was dismissed at trial, and the dismissal was upheld on appeal. After affirming the two elements of an oppression claim from *BCE*, the Supreme Court held that the fact that the corporation had failed to comply with the requirements of the *CBCA* in transferring M's shares did not on its own constitute oppression. Rather, the remedy is instead triggered by conduct that frustrates reasonable expectations.
>
> [106] In order to maintain an action for oppression, the petitioner must establish harm to his or her peculiar interests, and that harm must be distinct from the interests of others: *Jaguar Financial Corp. v. Alternative Earth Resources Inc.*, 2016 BCCA 193 at para. 179. Moreover, the contractual force of conduct permitted by a company's (or here, a society's) founding articles cannot be ignored when determining whether conduct is oppressive or unfairly prejudicial: *Walker v. Betts*, 2006 BCSC 128 at para. 81.

[37] Finally, I was referred by the petitioners to the decision of Mr. Justice Nathan Smith of this Court in *Cote v. Milltown Marina & Boatyard Ltd*., 2015 BCSC 2033. In

recognizing and acknowledging that the *BCE* is the leading authority, N. Smith J. confirmed a number of helpful guiding principles at para. 66:

> - The court has a "broad, equitable jurisdiction to enforce not just what is legal but what is fair". Courts considering claims for oppression "should look at business realities, not merely narrow legalities" (para. 58);
>
> . . .
>
> - The petitioner "must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held" (para. 70);
> - The existence of a reasonable expectation is to be determined objectively, based on the circumstances. The actual or subjective expectations of the petitioner are not determinative (para. 62); [and]
> - Factors that may be relevant to determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps party claiming relief could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders (para.72-81).
>
> . . .

Expectation of Involvement in Management of a Corporation

[38] *Diligenti v. RWMD Operations Kelowna Ltd.*, 1 B.C.L.R. 36, 1976 CanLII 238 (S.C.) was decided prior to the *BCE*. However, it continues to stand as good law for the proposition that the Oppression Remedy protects a shareholder's rights as a shareholder, and not any rights that shareholder may also have in other capacities such as an employee (see para. 13).

The Closely Held Family Company Dynamic

[39] A further key aspect of the petition, which impacts on the assessment of the petitioners' reasonable expectations, is the reality that the Corporations are family-run corporations. In *Hui v. Hoa*, 2015 BCCA 128, the Court of Appeal specifically addressed the interplay and tension arising between applying the Oppression Remedy in the context of family dynamics:

> [38] The oppression remedy derives from corporate law. It sits uncomfortably in the context of family disputes, where sometimes corporate positions are used as weapons. In my view, it is essential to examine the

> corporate rights of the parties as stakeholders in the corporation, not as members in a family. There is a risk that value judgments on the conduct of family members will distort an analysis of their rights as shareholders.
>
> . . .
>
> [40] That is not to say that familial or personal realities are irrelevant to the analysis; rather, they are often central to the determination of the relationships and expectations between the parties. In *Ferguson v. Imax Systems Corp.* (1983), 43 O.R. (2d) 128, [1984] O.J. No. 3156, an oppression remedy was granted on appeal to an ex-wife who, after many years of working for a closely held corporation, was frozen out by her ex-husband through a resolution reorganizing the company's capital. The court noted that in "dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (at 137). The court's analysis was rooted in the wife's role as a non-controlling shareholder and in the finding that she was entitled, based on all considerations both corporate and familial, to relief in light of her expectations as a shareholder. Her expectations were rooted in the corporate reality.

Removal of a Director

[40] The Oppression Remedy grants the court the statutory jurisdiction to make a wide variety of orders to remedy oppressive or unfairly prejudicial conduct to a shareholder or shareholders. Those orders can be made on an interim or final basis.

[41] One of those remedies is, as contemplated by s. 227(3)(f) of the *BCA*, the removal of a director.

[42] In *Walker v. Betts*, 2006 BCSC 1096 at para. 23, Madam Justice D. Smith, as she then was, discussed the principles in removing a director under s. 227(3)(f) of the *BCA*:

> [23] The removal of a director of a corporation is an exceptional remedy and one that is rarely exercised unless corrective sanctions are absolutely necessary. Circumstances which might give rise to such an order require something more than directors running afoul of their obligations, more than anticipated misconduct, or more than an apprehension of bias. However, where actual conduct rises to level of misconduct that triggers oppression remedy relief, judicial intervention by removing and replacing a director may be warranted in order to rectify or alleviate the oppression.

[43] This proposition was confirmed by Mr. Justice Armstrong in *O'Connell v. Mazilescu*, 2011 BCSC 732. In that case, the evidentiary record before the court was substantially more fulsome than in this petition. Amongst other things, there had

previously been an *Anton Piller* Order granted which revealed evidence of a corporate computer containing confidential information and key intellectual property having been cloned.

[44] Notwithstanding the more fulsome evidentiary record, Armstrong J. at para. 132 of *O'Connor* concluded that the removal of the personal respondents as directors was not "absolutely necessary corrective measures" on an interim basis but left the relief open as a possibility to be sought at trial (the petition in that case having been converted and action and placed on the trial list).

Failure to Prepare Audited Financial Statements

[45] In addition to the change in directorship, counsel for the petitioners relies, albeit not vigorously, on the fact that audited financial statements for the Corporations were not presented to the shareholders before the Meeting.

[46] In my view, this argument is a non-starter.

[47] Firstly, as I have noted, I do not even have evidence that the Meeting was an annual general meeting called in accordance with s. 182 of the *BCA*.

[48] Moreover, John, Nicolas, William, Michael and George were all directors of the Corporations up until the Meeting. In the event that it was an annual general meeting, all of the directors would have been aware of the statutory obligation to produce audited financial statements unless that requirement is waived by the shareholders. This links back to my concerns about the petition record as I have no evidence whatsoever if the requirement for audited financial statements was historically waived as, I will take judicial notice of, is often the case in closely held private corporations due to the significant difference in the cost of preparing audited financial statements versus notice to reader financial statements or even accountant-reviewed financial statements.

[49] Finally, John and Nicholas remain shareholders. If they did not or do not wish to continue to waive the requirement for audited financial statements for the

Corporations, they can require those to be prepared and presented. If they invoke their statutory right and it is not complied with, they continue to have possible future remedies available to them under the *BCA*. However, removing a director for failing to provide audited financial statements on the basis of the extremely limited evidence before me would be disproportionate to the possible non-compliance with the provisions of the *BCA* and verging on draconian.

Burden of Proof

[50] Before finally turning to my consideration of the substance of the petition on its merits, I confirm that the petitioners have the burden of establishing that the respondents failed to meet the reasonable expectations of the petitioners and that through an objective standard, this constituted oppressive or unfairly prejudicial conduct (see *BCE* at para. 165). This is not contested by the petitioners.

Conclusion re the Oppression Remedy

[51] As set out above, I have summarily dealt with the failure to provide audited financial statements at the Meeting as even reaching the basic threshold of consideration of meriting relief under the Oppression Remedy based on the above-referenced burden of proof.

[52] The crux of the petition is whether the election of Nicholas, Michael and George as the directors of the Corporations to the exclusion of John and William merits relief under the Oppression Remedy. In order to make such a finding, pursuant to the *BCE* analysis set forth above, I must conclude that the change in directorship at the Meeting was contrary to the reasonable expectations of John and William.

[53] In my view, based upon the evidence before me, I simply cannot reach such a conclusion.

[54] Specifically, applying the first part of the *BCE* inquiry, there is insufficient evidence to establish that there was a reasonable expectation that William would be elected as a director at the Meeting.

[55] Essentially all that I know is that the Corporations are closely-held family companies and that up to the date of the Meeting there were five directors. I do not know what their operations are so as to assess "general commercial practice". I do not have the articles of the Corporations. I have no evidence as the historical directorship of the Corporations to assess past practice. I have no minutes of the Meeting to confirm what John says was discussed. I do not even know the authority upon which the Meeting was being held. I simply have the conclusory statement which John adopts from para. 9 the petition (para. 8 provided for context):

> 8. At the SH Meeting the Petitioner, John Vassilaki, informed the shareholders that the Petitioner, Florio William Vassilakakis, should be appointed a director of the Companies together with Florio Michael Vassilakakis, who would replace his father Respondent, Nicholas Vasslilakakis [*sic*], and that Florio William Vassilakakis be appointed in place of the Petitioner, John Vassilaki.
>
> 9. That would be consistent with the agreement between the Petitioner, John Vassilaki and the Respondent, Nicholas Vasslilakakis [*sic*], when they were appointed as directors so that each of two brothers and their families could be involved in the decision-making of the Companies.

[56] As described by counsel for the personal respondents at the hearing of the petition, this may have been a "wish list" but the proof falls short of it being a reasonable expectation, even with recognition of the family dynamics of closely-held family corporations. This does also dovetail to the point referred to above by N. Smith J. in *Cote*, that a basic shareholders agreement could have alleviated at least this portion of the dispute between the two sides of the family.

[57] Having concluded that the claim for relief pursuant to the Oppression Remedy fails on step 1 of the *BCE* analysis, consideration of step 2 of the *BCE* analysis is rendered unnecessary. I will note, however, that the failings in the evidentiary record similarly preclude this Court from finding that the petitioners have satisfied the burden of proving that the change in directorship at the meeting establishes that the reasonable expectation (which I have found was not proven) was violated by conduct falling within the definition of "oppressive" or "unfairly prejudicial" as defined above in the caselaw.

[58] I thus dismiss all claims for relief in the Petition.

Special Costs – The Law

[59] The respondents seek special costs of the petition pursuant to R. 14-1(1) of the *Rules*. They do so primarily on the basis of para. 13 of the petition (as adopted into John's Affidavit) which states:

> 13. The Respondents, by their action or conduct, have threatened to remove funds from the bank that holds funds for JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd., which through their actions intend to deplete the Companies funds for the Respondents Nicholas Vassilakaki [*sic*] and Florio Michael Vassilakakis' own personal gain or for which they will gain a financial interest or benefit from.

[60] There are absolutely no particulars of these alleged threats provided or any supporting evidence. The respondents say that, in the circumstances, this allegation is tantamount to making an allegation of fraud. As detailed, making unsubstantiated claims of fraud or deception will often attract an order for special costs.

[61] The respondents further submit that the petition was doomed to fail and that, in somewhat exceptional circumstances, this can also justify an order for special costs.

[62] In *Lucarino v. Rast*, 2022 BCSC 1019, Mr. Justice Riley very helpfully summarizes the law with respect to special costs. I will adopt his summary as set out at paras. 18–23:

> [18] The court has authority to award special costs under R. 14-1(1) of the *Rules*, and also as an aspect of the court's inherent jurisdiction to control its process: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 [*Westsea*] at paras. 25–26. By either route, such a remedy is reserved for "exceptional cases": *Westsea* at para. 34.
>
> [19] The threshold for awarding special costs is "reprehensible conduct" on the part of one of the parties. The concept of "reprehensible conduct" is said to encompass not only "scandalous or outrageous" conduct, but also "milder" forms of misconduct that are "deserving of rebuke": *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 56–57.
>
> [20] Special costs are intended to be "punitive in nature", hence the reference to conduct that is "deserving of rebuke": *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 ["*Mayer*"] at para. 8 (reversed on other grounds in *Mayer v. Mayer*, 2012 BCCA 77). In *Mayer*, Mr. Justice Walker set

out the following list of circumstances or categories of conduct that might be said to justify an award of special costs: (a) where a party pursues a meritless claim and is reckless with regard to the truth; (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty; (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient; (d) where a party made the resolution of an issue far more difficult than it should have been; (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party; (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit; (g) where a party brings a proceeding for an improper motive; (h) where a party maintains unfounded allegations of fraud or dishonesty; and (i) where a party pursues claims frivolously or without foundation.

[21] In the case at bar, one could not say that the plaintiff somehow sought to abuse a financially superior position to improperly or pressure or financially burden the defendants as contemplated in category (e) of Walker J.'s list. Nor is there any evidence that the plaintiff's claim was brought for an improper purpose as contemplated in para. (g). However, there are features of this case that fit into most if not all of the other categories described in *Mayer*. The plaintiff's claims were found to be meritless, and there are features of the claims that appear to have been pled and pursued recklessly without regard to the truth and without foundation, per categories (a) and (i) in Mayer. The plaintiff's claims include allegations of dishonest conduct akin to fraud, and those allegations were maintained throughout the proceedings and never supported by any admissible evidence, as contemplated in categories (b) and (h) in *Mayer*. The plaintiff appeared to show reckless indifference to the lack of merit in his claims, and pursued them in a manner in which they were bound to fail, even after fatal deficiencies were pointed out in opposing counsel's correspondence, as per paragraphs (c) and (f) in Walker J.'s list.

[22] I stress that this was not merely a weak case that failed on the merits for a simple lack of proof. If that were all that occurred, the defendants would have an entitlement to tariff costs under the *Rules*, but there would be no basis for a special costs order intended to rebuke the unsuccessful litigant. Rather, this is a case where some of the key claims were ill conceived and could never have succeeded by way of an action brought by this plaintiff against these named defendants. The claims also included allegations of impropriety akin to fraud, supported by nothing more than speculation and various forms of manifestly inadmissible evidence. It is no excuse that that plaintiff was impecunious and lacked the means to remedy the deficiencies or proceed in a different manner. Indeed, the plaintiff drew attention to his impecuniosity, suggesting that if the claim failed the defendants would get nothing but a dry judgment on costs. This leads me to conclude that the plaintiff was prepared to pursue allegations of serious impropriety against the opposing party with reckless abandon, on the theory that he had little to lose if his claim failed.

> [23] Given the absence of improper motive, malice, or deliberate abuse of the court's process, I would not characterize the conduct in issue in this case as "scandalous" or "outrageous" within the meaning of the costs jurisprudence. I nonetheless find the conduct of the plaintiff's case as I have described it above to be "reprehensible", albeit on the milder end of the spectrum discussed in the case law. I find that the manner in which the plaintiff's case was conducted is deserving of rebuke by way of an order for special costs.

[63] In *Chancery Estate Holdings Corp. v. Sahara Real Estate Investment Inc.*, 2012 BCSC 822, Madam Justice Loo addresses the issue of special costs in some detail. Specifically, at paras. 12 and 13 she cited two key cases as to where special costs may be awarded against a party that advanced a case that was bound to fail:

> [12] Advancing claims that are bound to fail may ground an award for special costs. In *McLean v. Gonzalez-Calvo*, 2007 BCSC 648 Madam Justice MacKenzie (as she then was) at para. 26 stated:
>
> > An additional basis for an award of special costs arises because the plaintiff's case was so weak it was bound to fail. In *Solex Developments Co. v. Taylor (District)* (1998), 60 B.C.L.R. (3d) 53 (C.A.), an award of special costs was upheld on this ground. Madam Justice Southin said at paras. 26 and 27:
> >
> > > I consider this was a proper case for special costs, but not for the reasons of the learned judge which are founded on what the appellant did to collect evidence before bringing the proceedings and of what she considered its improper purpose or motive in seeking to set aside the approval.
> > >
> > > It can, in my opinion, be misconduct in litigation, as that phrase is used in the authorities, to persist with a claim under the *Judicial Review Procedure Act*, a claim which in this case affects someone else's private right, when it is plain that, in the circumstances, the claim is bound to fail. Once the appellant knew from the affidavit of Mr. Scriba that, in fact, the spirit of the *Waste Management Act* was being observed by the respondents, it ought to have accepted that it could not succeed.
>
> [13] Justice J. W. Williams in *Webber v. Singh*, 2005 BCSC 224, rev'd on other grounds 2006 BCCA 501, at para. 28 stated:
>
> > In terms of the type of specific conduct that will fall within the foregoing framework, the following is a brief summary of some circumstances where the court has held that special costs may be imposed:
> >
> > (a) special costs may be ordered where a party has displayed "reckless indifference" by not seeing early on that its claim was manifestly deficient (*Concord*

Industrial Services Ltd. v. 371773 B.C. Ltd. (2002), 17 C.L.R. (3d) 315 at para. 27 (B.C.S.C.); leave to appeal refused 2002 BCCA 614);

(b) special costs may be ordered to punish careless conduct (*Bank of Credit & Commerce International (Overseas) Ltd. v. Akbar* (2001), 86 B.C.L.R. (3d) 312 (C.A.));

(c) special costs may be ordered where a party pursues a meritless claim and is reckless with regard to the truth (*Equus Technologies Inc. v. Sage Automation Corp.*, [2003] B.C.J. No. 2696 (S.C.)).

Special Costs - Analysis

[64] Applying the aforesaid law within the context of R. 141(1) of the *Rules*, I cannot conclude that para. 13 of the petition (as adopted into John's Affidavit) would in and of itself justify a claim for special costs.

[65] The allegation does not specifically say that funds have been removed from bank accounts belonging to the Corporations. It just alludes to a concern about this occurring in light of the change in directorship which was the crux of the petition. Further, no weight was placed on this allegation in submissions by counsel for the petitioners at the hearing of this matter. It was, I find, essentially a throw away allegation which was perhaps imprudently included in the petition but which does not in and of itself meet the standard of reprehensible conduct.

[66] The more vexing question is whether special costs are appropriate because it ought to have been apparent to the petitioners that the claim was doomed to fail. This is challenging because it may be that there was further evidence available to be led which would have allowed this Court to engage in a more fulsome analysis of the stage 1 reasonable expectations analysis in *BCE*. Whether the reasonable expectation could have been proven on that evidence remains unclear, but there surely was other evidence that could have assisted the Court in its analysis as identified above.

[67] Moreover, the petitioners were aware back in March 2023 that the respondents were making the tactical decision to not tender any evidence in

response to the petition. At this point, or fairly shortly thereafter, it ought to have been clear to the petitioners that the petition had no chance of success unless further evidence was tendered. They continued to pursue the relief sought nonetheless.

[68] I find, described by Mr. Justice J. Williams as cited above, this is to be a situation where a party has displayed “reckless indifference” by not seeing early on that its claim was manifestly deficient.

[69] I thus exercise my discretion to award special costs of the petition to the respondents pursuant to R. 14-1(1) of the *Rules*.

[70] For the purposes of any future assessment of special costs before the registrar, if they cannot be agreed upon by consent, I note that the petition was filed in the Penticton registry. For scheduling reasons, it was heard in Kelowna. All counsel are from the Lower Mainland. It was, of course, the respondents’ choice to have out-of-town counsel. However, there was nothing particularly unique about the petition and local counsel could have been retained. As such, travel costs shall be excluded from the assessment of special costs.

“Hardwick J.”