IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *New Great Land Developing Ltd. v. 1034113 B.C. Ltd.,* 2023 BCSC 2207

Date: 20231214
Docket: S227351
Registry: Vancouver

Between:

New Great Land Developing Ltd.

Petitioner

And

1034113 B.C. Ltd. and Yi Du

Respondents

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for the Petitioner:	S. Xue
Counsel for the Respondent, Yi Du:	K. Milinazzo M. Aspiazu, Articled Student
Place and Date of Hearing:	Vancouver, B.C. October 30, 2023
Place and Date of Judgment:	Vancouver, B.C. December 14, 2023

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I. INTRODUCTION

[1] The respondent, Yi Du, applies to convert this petition into an action. For the reasons below, I agree that this is the proper approach. There are too many issues and too much conflict in the evidence to support anything less than a trial.

II. BACKGROUND

[2] The dispute between the parties relates to the purchase and sale of 13340 112th Avenue, Surrey, BC and 11151 Bolivar Road, Surrey, BC (the "Properties") by the corporate respondent 1034113 B.C. Ltd. (“1034”).

[3] This case asks the Court to determine the rights and entitlements of the petitioner minority shareholder (“NGLD”) of 1034. 1034 is the former owner of the Properties.

[4] As noted, the facts are highly contested, which is a key basis for my decision to refer the proceeding to the trial list.

[5] In March 2015, NGLD’s principal, Mr. Jun He had an agreement in place whereby NGLD would purchase the Properties in its name. The Properties were available at a price that Mr. He believed to be below market value.

[6] Mr. He sought assistance in financing the purchase of the Properties. Although there is some debate about the genesis of their discussions, it is not disputed that Mr. He and the respondent Ms. Yi Du’s spouse, Evan Wang, entered into negotiations. Ms. Du and Mr. Wang ultimately agreed to contribute the down payment required to purchase the Properties.

[7] In terms of the structure of their arrangement, there was unfortunately no comprehensive written agreement. Rather, the only written documents of note are the April 2015 incorporation materials creating 1034 (the “Incorporation Documents”). 1034 was the corporate vehicle intended to be used to purchase the Properties. Pursuant to the Incorporation Documents, NGLD received 40% of 1034’s Class B non-voting shares entitled to dividends, and Ms. Du controlled the balance

of that share class through her company 1033695 B.C. Ltd. (“1033”). 1033 also controlled 100% of the Class A voting shares. Given her control position, Ms. Du became the sole director of 1034, and no officers were appointed.

[8] In terms of the basis for NGLD’s 40% allocation, Mr. Wang states that:

> It is well known that Mr. He usually charged 20% for each transaction he is involved in. … Mr. He and I reached [an] agreement that he could have a 40% share. ... To compensate Mr. He for the great deal, I said that Mr. He could take a 40% share which was twice his usual rate.

[9] I note that the Incorporation Documents were executed at a lawyer's office. Evidence from this lawyer will likely be germane in resolving the disputes (the “Solicitor Evidence”).

[10] Any additional terms to the parties’ arrangement (the “Agreement”) would have had to have been oral. As will become clear from the discussion below, it will be a challenge for the trier of fact to determine the precise terms of the Agreement as a result. For example, NGLD alleges that the oral terms of the Agreement (as well as the reasonable expectations underlying the oppression claim) required that the net proceeds of the sale of the Properties be distributed immediately upon completion of any sale, and there would be no further investments made through 1034. Ms. Du (and Mr. Wang) disagree. Mr. Wang states that it was only agreed that no other properties would be purchased at the same time that the Properties were being developed. Ms. Du will argue that when 1034 was incorporated, she and Mr. Wang considered Mr. He a potential partner for further future projects, particularly given the potential benefit of Mr. He's substantial real estate investment expertise. This dispute about the proper timing of the distribution of the sale proceeds is a core issue in this matter (the “Distribution Date Dispute”).

[11] NGLD has signalled that it will seek to support its position on the Distribution Date Dispute with evidence from Mr. He's partner in another development, Jian Hua Zhao. Mr. Zhao provides evidence of Mr. He's allegedly "common" terms. Ms. Du disputes whether the alleged terms were Mr. He’s invariable practice (the “Common Terms Dispute”).

[12] Returning to 1034's initial purchase of the Properties, on April 20, 2015, 1034 and NGLD entered into an assignment agreement whereby NGLD assigned its contract of purchase and sale for the Properties to 1034 (the "Assignment Agreement"). 1034 then purchased the Properties using a combination of a down payment from Ms. Du and a mortgage from First Commercial Bank ("First Commercial").

[13] Ms. Du alleges that she implemented a comprehensive strategy to obtain the best return possible for 1034's shareholders, including NGLD. Ms. Du retained Brimming Development, a real estate development and management company owned and operated by herself and Mr. Wang, to advance the development. Ms. Du alleges that she and Brimming Development:

a) met with City of Surrey staff to understand applicable policies to the site and development feasibility;

b) ensured that the site was maintained and compliant with the applicable City of Surrey bylaws;

c) engaged various environmental, architectural and surveying firms to advance the prospective development of the site;

d) obtained appraisal reports;

e) engaged a commercial lender for development financing;

f) prepared an analysis of the feasibility of a rental development;

g) explored the possibility of a joint venture with a development firm;

h) retained and worked with a broker to market and sell the Properties; and

i) exercised commercial judgment in negotiations with the purchaser.

(the "Development Effort Evidence")

[14] NGLD does not dispute that this development work was done, but disputes that these steps added any value to the Properties (the “Management Dispute”). Specifically, NGLD intends to argue that:

a) There were reasons not attributable to the respondents that contributed to the sharp increase in the market value of the Properties. For example, Mr. He’s position is that his own rezoning and development work on three adjoining lots that he controlled (the “Three Lots”) may have been a significant reason for the increase.

b) The market value of the Properties could have been pushed further upwards in two ways, but the respondents did neither. The first was to change the nature of the Properties by either a successful development permit application or physical development. The second was to create new demand or a new market through innovative marketing.

c) The final sale price was inferior to the price achieved for a neighbouring plot and the assessed value and offered price for the Three Lots.

[15] For her part, Ms. Du has signalled an intention to call expert evidence to defend the allegation that her efforts did not add value. The respondents also claim that the market value of the Properties was significantly increased because they were able to provide evidence to the eventual buyer that the maximal buildable area was 200,000 square feet, beyond what Mr. He had initially estimated. NGLD argues that other than Ms. Du's bald assertion, there is no evidence that the maximal buildable area impacted the price. NGLD accepts that an undated Achievable Density report by Aplin Martin assesses the achievable density of the Three Lots as 163.376 sq. ft. in a 4-storeys scenario and 246,564 sq. ft. in a 6-storeys scenario. However, NGLD argues that the report assumes that an increase to 6 storeys would be supported by the City of Surrey (the “Building Area Dispute”).

[16] As noted, part of the evidence that NGLD intends to rely upon to support its position on the Management Dispute relates to the Three Lots development. NGLD

has provided evidence concerning Mr. He's work on the Three Lots and the impact of this work on the value of the Properties. Beyond Mr. He's own evidence, NGLD has indicated an intention to rely on evidence from the following individuals:

a) Andrew Baker: Mr. Baker is a professional engineer who has worked on various development projects with Mr. He. Mr. Baker's affidavit provides details of the Three Lots development application and an opinion on the impact of the Three Lots on the value of the neighbouring properties.

b) Jian Zhao: As noted, Mr. Zhao is Mr. He's business partner in the Three Lots project, who provides evidence of what he describes as Mr. He's common business terms and practices. Mr. Zhao also provides evidence on the Three Lots application and the terms of a proposed joint venture that was proposed to Mr. Wang between the Properties and the Three Lots.

c) Bing Wu: Mr. Wu is a real estate agent who provides evidence about Mr. He's efforts to purchase 13307 King George Boulevard in 2015, a lot adjacent to the Three Lots and the Properties, and the pricing of that lot.

[17] Mr. He's affidavit also includes an allegation that he, Mr. Wang and Ms. Du discussed that the Properties should be joined with the Three Lots to create a larger joint development application. However, NGLD clarified at the hearing that it is not seeking to enforce any such agreement. NGLD still intends to use evidence regarding the Three Lots (the "Three Lots Evidence") to support its position on the Management Dispute. By September 2017, Ms. Du declined to have the Properties participate in a joint application with Mr. He's Three Lots development.

[18] Ms. Du claims that NGLD agreed to sell its shares to the respondents in 2017, but failed to complete the sale as agreed. The petitioner acknowledges that there were discussions about this issue, but denies that the parties agreed on the terms of a sale. NGLD argues that if the respondents were to enforce any such agreement, they would have needed to do so before the limitation period expired (the "Sale Dispute").

[19] The development of the Properties hit a cash crunch in 2018. First Commercial called its mortgage on March 16, 2018 and required it to be paid out by June 29, 2018. Ms. Du's evidence is that Mr. He orally agreed that if an alternate lender could not be found, any funds used by Ms. Du to pay off the mortgage would incur interest at the same rate as an external lender. After Mr. He advised Ms. Du that an alternate lender could not be found and that he could contribute himself, Ms. Du paid off the First Commercial mortgage with her own funds to avoid foreclosure. On June 9, 2018, Mr. He texted the following offer to Ms. Du:

> Although the bank loan is expired now, we can still find other bank loans. Even if the interest is higher, comparing the return on this project it is only a drop in the bucket, only tens of thousands dollars more per year. In my opinion, loan it is. If you have the money, the company can also pay you 8% annual interest on the loan part. I think this is sincerity and the way to do business together.

[20] The determination of the interest rate properly payable to Ms. Du for her additional contribution is now disputed, as discussed further below (the “Interest Dispute”).

[21] In December 2021, the sale of the Properties was completed for $16.7 million, yielding a $13.75 million profit over the $2.95 million purchase price. Mr. He agrees that he consented to a sale at this price. In a contemporaneous text message to Mr. Wang, Mr. He described the sale as "wonderful." At the hearing, NGLD clarified that it would not argue that Ms. Du should have received a higher price, but NGLD will argue that the price achieved did not justify the bonus and management fees charged. In response, Ms. Du alleges that Mr. He promoted lower price offers himself (the “Price Dispute”).

[22] On February 15, 2022, Mr. Wang sent a plan for shareholder distribution to Mr. He, which included a "Loan interest expense relating to shareholder loan" of $724,222.96, which amount Mr. He is still prepared to accept as reasonable. However, Ms. Du applied interest of 10% or $1,810,557.42. Ms. Du argues that the correspondence from Mr. Wang represented a preliminary proposal only. I will refer to the debate regarding the proper interest rate as the “Interest Dispute”.

[23] WeChat records covering the period between December 2021 and May 2022 (the "WeChat Evidence") suggest that Mr. Wang and Mr. He did discuss a plan for the immediate distribution of the net profits. NGLD will argue that this exchange supports its position that it was an oral term of their agreement that profits would be distributed following a sale. Ms. Du's position is that such discussions did not bind her. She says she rejected the concept of immediate distribution after considering the potential tax implications and other amounts payable.

[24] Ms. Du determined that it would be appropriate for her to receive a $210,000 bonus for her work. NGLD alleges this was also an oppressive act, as it did not meet its reasonable expectations. NGLD says that it understood that no bonus would be paid without its approval or, in the alternative, that the bonus amount was unreasonable in the circumstances (the "Bonus Dispute").

[25] Ms. Du also authorized the payment of $2,216,663.43 to Brimming Development as a management fee. NGLD disagrees with this decision and argues it was a further act of oppression (the "Management Fee Dispute").

[26] NGLD clarified at the hearing that it will not argue that Ms. Du had no power to award a management fee or bonus, just that she and Brimming Development did not do enough to justify either payment.

[27] In late 2022, 1034 invested in the purchase of a new property, which NGLD alleges was inconsistent with the Agreement and constitutes an additional act of oppression (the "New Purchase Dispute").

[28] In sum, it will most likely be necessary for the trier of fact to resolve all of the following disagreements:

a) The Distribution Date Dispute;

b) The Common Terms Dispute;

c) The Management Dispute;

d) The Sale Dispute;

e) The Interest Dispute;

f) The Building Area Dispute;

g) The Price Dispute;

h) The Bonus Dispute;

i) The Management Fee Dispute; and

j) The New Purchase Dispute;

(collectively, the “Disputes”).

[29] Given the Disputes, counsel agreed that approximately $3.5 million from the sale of the Properties would be held in Ms. Du’s counsel’s trust account until a court order or further agreement of the parties.

[30] On September 8, 2022, NGLD filed this Petition pursuant to ss. 227 and 324 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]. NGLD alleges oppression by Ms. Du. The reasonable expectations said to have been undercut by Ms. Du’s conduct are particularized as follows:

> The Net Profits be promptly distributed as dividends in a fair manner (the '"First Expectation"). A fair distribution of dividends requires that the respondents not pay themselves or an affiliate any bonus, interest or management fee without the petitioner's consent, or, in any event, unreasonably pay themselves or an affiliate any bonus, interest or management fee. Under the circumstances described herein, a fair distribution of dividends will preclude the Additional Benefits Request.

[31] In terms of remedy, NGLD seeks:

a) an immediate payment of 40% of the net proceeds from the sale of the Properties as a dividend;

b) a prohibition on the payment of any management fees, bonus or interest to Ms. Du or any affiliated companies;

c) a liquidation and dissolution of 1034; and

d) an accounting of the Net Profits and the costs of 1034.

[32] On April 27, 2023, counsel for Ms. Du advised counsel for NGLD that, in Ms. Du's view, resolving all of the Disputes required examination for discoveries, cross-examination of witnesses, expert evidence and full document production. Ms. Du sought consent to move the matter to the trial list and suggested booking a 10-day trial for Fall 2024.

[33] In NGLD's response of May 8, 2023, a hybrid procedure was proposed, with cross-examination on the affidavits, expert evidence with cross-examination, and limited discovery. NGLD has indicated a desire to cross-examine Ms. Du and Mr. Wang. At the hearing, NGLD also indicated that it was open to:

a) expanding the scope of affidavit cross-examinations to cover all relevant issues;

b) limited in-court examinations; and

c) production of all relevant documents.

III. ANALYSIS

A. Applicable Legal Principles

The Rule

[34] Rule 22-1(7)(d) of the *Supreme Court Civil Rules* provides that on the hearing of a chambers proceeding, the court may order a trial of the matter:

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

Cepuran v. Carlton

[35] In *Cepuran v. Carlton*, 2022 BCCA 76, the Court of Appeal modified the test regarding when it is appropriate to convert a petition to an action.

[36] Before *Cepuran*, the leading authority was *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P./Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 [*Saputo*]. *Saputo* affirmed the longstanding test that required a petition to be converted to an action if there was a triable issue unless the applicant was bound to lose.

[37] Under the new *Cepuran* framework, if there is a triable issue, the Chambers Judge retains the discretion to convert the matter to an action or to use hybrid procedures within the petition proceeding pursuant to R. 16-1(18) and R. 22-1(4): para. 160. In other words, the mere fact that there is a triable issue is no longer enough to discard a petition in favour of an action: para. 158. The Court of Appeal sought to give effect to the "modem approach to civil procedure" by giving trial courts the tools necessary to "tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits": para. 159. The Court was reluctant to provide a fixed set of factors for a judge to consider in exercising their discretion, stating it is up to the courts to determine the issue on a case-by-case basis: paras. 161-162. The Court, however, commended earlier reasoning in *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc*., 2009 BCSC 1701 [*Boffo*] and *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627 [*Terasen*], which set out certain factors to consider: *Cepuran* at para. 165.

[38] In *Boffo*, the Court cautioned against "addressing the resolution of a *bona fide* triable issue through the creation of a hybrid proceeding that permits certain pre-trial and trial mechanisms to the parties, but denies them others": para. 50. This concern was echoed by the Court in *Cepuran*, which opined that a hybrid process needs to "provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court…": para. 160. Although the starting point

for matters properly brought by way of petition is that a summary procedure will be appropriate, fairness is the ultimate consideration: *Cepuran* at paras. 158-160.

[39] *Boffo* also highlighted a concern that including pre-trial and trial procedures within a petition hearing may overwhelm and undermine the benefits of the intended summary process:

> [50] …Where the driving underpinning for such approach is largely one of practicality, it strikes me that there is a very real risk of diminishing returns where the summary process is expanded to allow the filing of additional lengthy affidavits, cross-examination on affidavits and possibility a broader scope of cross-examination, selective document disclosure, and other features of the trial process. <u>At some point, the process that looks like a trial, should be trial.</u>
>
> [Emphasis added.]

[40] In *Terasen*, at para. 39, the Court endorsed the following factors to consider in deciding whether to convert a petition to an action:

a) the undesirability of multiple proceedings;

b) the desirability of avoiding unnecessary costs and delay;

c) whether the particular issues involved require an assessment of the credibility of witnesses;

d) the need for the court to have a full grasp of the evidence; and

e) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.

Case Law Guidance Since Cepuran

[41] In *Taj Park Convention Centre Ltd. v. Sher-A-Punjab Community Centre Corporation*, 2022 BCSC 473 [*Taj Park*], Justice Skolrood referred a petition to the trial list where there were significant factual issues to be resolved with regard to what "reasonable steps" should have been taken in relation to certain rezoning efforts: paras. 40-43. The Court found numerous factual disputes that could only be properly

addressed by referring the matter to the trial list: para. 54. The petition was inadequate to permit a full and thorough examination of the case: para. 56. The Court found that the lease agreement at issue was not clearly drafted. The lease agreement had "a number of uncertainties and ambiguities in the clauses relied on by both parties," which required "ascertaining the parties' intentions" with respect to certain clauses in dispute, and "the surrounding circumstances or factual matrix are thus of considerable relevance in this case": paras. 52, 54.

[42] In *Phaneuf v. 0896459 B.C. Ltd*., 2022 BCSC 1706, Justice Jackson referred a petition commenced under the *BCA* to the trial list. The petitioners sought rectification of the articles of incorporation to incorporate the terms of a disputed oral contract. The Court found this would require a credibility assessment of the people involved in the alleged agreement. The Court noted that:

> [9] … In the context of an oral agreement there is greater flexibility with respect to the nature of the evidence that is admissible to prove the terms of the contract and the meaning of the language used by the contracting parties, since the key interpretive tool – the words of the agreement itself – are not available: [citations omitted].

[43] Justice Jackson was also concerned that there were documentary gaps that required full discoveries. Finally, she noted the inefficiency created by the lack of certainty associated with a hybrid proceeding:

> [73] To these observations I would add the risk that a hybrid process may foster a lack of certainty about the applicable procedure, which can in tum lead to the need for interim determinations, whether through interim applications, requests for directions, case planning conferences, or even case management, all of which further engage judicial resources, potentially involving multiple judicial officers, each of whom will each need to become familiar with the history and context of the case. This does not serve the objective of judicial economy. Conversely, if a matter is referred to the trial list the applicable procedure is well established. The parties can always seek to present non-contentious evidence by affidavit or agreed statement of facts if they wish to do so.
>
> [74] Although it is possible the chambers judge may decide "some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the Court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial" (*Cepuran* at para. 160). there is also the risk that the limited investigation, once completed, will prove inadequate. There is no guarantee the chambers judge

> who orders a hybrid process will be the chambers judge who later hears the (hybrid) petition, and it is by no means certain to me that the second chambers judge would be bound to accept the decision of the first chambers judge that a hybrid petition hearing is sufficient.

[44] In *Shergill v. Bains*, 2022 BCSC 1363, Justice Wilkinson exercised her discretion to refer a petition to trial where there was a complex, inconsistent and conflicting factual record involving a large sum of money. The authenticity and proper translation of the recordings of relevant meetings were also at issue: para. 37.

[45] In *Capital Now Inc. v. Munro*, 2023 BCSC 197, the respondents sought to appeal an order *nisi* granted by a Master and convert the petition to an action. The underlying dispute arose from debts, guarantees and a mortgage relating to a lending and borrowing arrangement that spanned approximately 12 years. There was complex and conflicting evidence, including significant disagreements regarding the financial arrangements that existed between the parties. The Court found "serious credibility issues and evidentiary gaps that need to be resolved": para. 94. Justice MacDonald concluded that there were enough material conflicts in the evidence to conclude there were *bona fide* triable issues. The hybrid procedure proposed by the petitioner was rejected. In light of the substantial amount of money at stake, as well as the inconsistencies and complexity of the parties' evidence, Justice MacDonald found that a hybrid procedure would result in an injustice to the parties. She concluded the appellants were entitled to full trial protections, such as pleadings, comprehensive document production and cross-examination. She concluded:

> [98] This Court ought to be cautious in making orders which have the objective of addressing the resolution of a bona fide triable issue through the creation of a hybrid proceeding that permits certain pre-trial and trial mechanisms to the parties but denies them others. While the driving underpinning for such an approach is largely one of practicality, there is a risk of diminishing returns where the summary process is expanded to allow the filing of additional lengthy affidavits, cross-examination on affidavits (including possibly a broader scope of cross-examination), selective document disclosure, and other features of the trial process.

> [99] It is in the interests of justice that the Munros be permitted to proceed to trial in order to obtain all relevant evidence and disclosure in the ordinary course of preparing for trial. This will allow Capital Now to attempt to prove its case on a full evidentiary record and allow the Munros to mount a meaningful defence.
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> ...
>
> [101] Here, anything less than full and frank disclosure and discovery rights would result in an injustice to the parties, particularly the Munros.

[46] In *Han v. Han*, 2023 BCSC 1210, a foreclosure proceeding was opposed on the basis that mortgage funds were never actually advanced to the respondent. The Court moved the petition to the trial list. A mother, the petitioner, claimed a debt from her son, the respondent, but “the evidence provided by both parties [was] sparse and the lack of detail and assertions of important facts [was] concerning”: para. 10. The Court would need to hear evidence on the amount of debt owed to the petitioner as there was no evidence before the Court about the amount or timing of funds advanced. There was also an inconsistency between the mortgage and petition: the petition claimed interest was payable under the mortgage whereas the mortgage indicated no interest was payable: para. 26. The Court held that the issues could not be resolved simply by cross-examining witnesses on their affidavits. Nor could the evidence be fairly dealt with using other hybrid procedures: paras. 32-34. .

[47] In *Chandra v. Chandra*, 2023 BCSC 1069, the Court declined to convert a petition to an action. Instead, the Court allowed for a hybrid procedure. The Court provided that the parties could use, as part of the hybrid procedure, Rules 7-(10) and (11) in respect of demands for further documents not exhibited to the affidavits as filed to date, Rule 7-1(18) for documents in the possession of third parties, Rule 7-1(2) as to examinations for discovery and Rule 7-1(5) for the examinations of witnesses. The Court also directed that any examinations would not be limited to cross-examination on the affidavits: para. 33.

[48] In *Horseshoe Valley Ranch Ltd. v. Pillar Capital Corp.*, 2023 BCCA 379 [*Horseshoe Valley*], our Court of Appeal declined to intervene in the Chambers Judge's decision to refer a matter to the trial list. Although there were three triable issues raised, hybrid procedures would adequately and fairly determine these

issues: specifically, “[t]he chambers judge granted the parties leave to exchange expert evidence and further affidavits and to conduct cross-examinations in support of their positions on the issues of criminal interest rate and improvident realization”: para. 13. The Court of Appeal agreed that the three triable issues did not require pleadings or discovery to be properly resolved. The issues could be fairly resolved through the more limited process. Note that the three remaining issues were quite narrow, legal, or mathematical: “(1) Pillar received an annual rate of interest in breach of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46, (2) Pillar improvidently realized on its security, and (3) Pillar made mistakes in calculating the amount due and owing.”

B. Application of the Principles

[49] I apply the factors set out in *Terasen* below. I then consider whether a hybrid approach could still facilitate a just result given the identified triable issues. Finally, I review how this case fits within the case law spectrum illustrated by the above authorities.

Are there triable issues?

[50] For the purposes of R. 22-1(7), a *bona fide* triable issue is an issue of fact or law that is not bound to fail: *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at para. 80. Put differently, a triable issue arises where, on the evidence before the court, there is a dispute as to facts or law which raises a reasonable doubt or suggests there is a defence that deserves to be tried: *Boffo* at para. 48. Disputes must be *bona fide*, not hypothetical or abstract. However, it is “not the Court’s role … to sort out complex factual issues, nor is it appropriate to apply the law to facts which are unclear”: *Capital Now Inc.* at para. 74.

[51] There was little dispute that there are several triable issues raised in the present proceeding. Regarding the core claim, establishing a right to an oppression remedy requires that a claimant identify the expectations violated by the conduct at issue and establish that these expectations were reasonably held. Factors 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: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 72.

[52] I find that all the Disputes create triable issues germane to determining NGLD's reasonable expectations. For example, it will be necessary for any court to consider what effect to give the WeChat Evidence. Specifically, is the discussion of the immediate distribution of the profits with Mr. Wang enough to create an obligation on the part of 1034 to immediately distribute the profits or a similar reasonable expectation on the part of NGLD? Whether NGLD is entitled to a remedy is not just a "simple exercise of accounting": *Capital Now Inc.* at para. 78.

The undesirability of multiple proceedings

[53] This is not a factor in the present case. There is only one matter. Only one proceeding is required should the matter be converted to a trial.

The desirability of avoiding unnecessary costs and delay

[54] The parties accepted that five days would be a reasonable estimate for the time required for the hearing of the Petition. The parties' estimates for the time required for a trial were between 10 and 20 days.

[55] This additional time required for a trial does favour leaving the matter as a petition at first blush. However, in my view, the increased time demands of a trial may not be as extreme as the estimates suggest. Specifically, the hybrid procedure proposed by NGLD will itself take some time to implement, whereas there may be 10-day trial windows available as early as the first quarter of 2025.

[56] The weight of this factor is somewhat diminished as there is no particular urgency given that Ms. Du's counsel has adequate funds in trust to protect against any judgment in this matter.

Whether the particular issues involved require an assessment of credibility

[57] This is the strongest factor in favour of conversion to a trial. There are multiple areas where the determination of credibility will be essential. Indeed, this is a somewhat unusual situation in that the party opposing conversion to a full trial actually has the greatest need to establish that the disputed evidence regarding oral discussions should be treated as supporting its position.

The need for the court to have a full grasp of the evidence

[58] This factor also supports moving this case to the trial list. Our system is based on the presumption that there is a material advantage to be gained by allowing the court to see witnesses answer questions so that it may assess demeanour: *R. v. N.S.,* 2012 SCC 72 at paras. 21-27. Several Disputes may turn on the court's assessment of each party's credibility.

[59] In-court examination also allows the court to ask clarification questions after the witness's testimony. Given the wide nature of the Disputes, I expect this ability will be important in a case such as the present one.

Whether it is in the interests of justice that there be pleadings and discovery

[60] This is generally the most important factor to consider: *Taj Park* at para. 38. Given the complexity of the Disputes, I believe that a full set of pleadings setting out the parties' positions will assist the Court and the parties. Even at the hearing before me, each party was compelled to clarify their positions in ways not revealed by the cursory petition and response. These positions would have been clearer through more extensive trial pleadings. In this regard, I find myself in the same situation as the Court in *Taj Park*, in that:

> [56]… [The] pleadings as they presently exist are inadequate to permit a full and thorough examination of the factual and legal issues running through the parties' dispute. This is reflected in part by the fact that both parties made extensive submissions at the hearing on issues not raised in the pleadings.
>
> …

> [60] While the Court generally strives to decide cases based upon the existing pleadings, the failure of the existing petition and response to address the full range of factual and legal issues arising in the parties' dispute underscores the fact that the matter is not suitable for determination as it is presently constituted.

[61] The millions of dollars at issue in this case also support the imposition of more extensive pre-trial procedures as a matter of proportionality: *Capital Now Inc.* at para. 93.

[62] It is also important to recall that converting this matter to a trial will not prevent NGLD from later seeking to resolve all or certain issues by summary processes: *Shergill* at para. 42.

The Potential for a Hybrid Procedure

[63] In *Cepuran*, the Court stated:

> [159] The modem approach to civil procedure, as encouraged in *Hryniak*, is to allow parties and the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits...
>
> [160] … For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

[64] I have considered whether hybrid procedures would save time and expense while maintaining the Court's ability to make a fair and just determination.

[65] After considering the various tools that would have to be included in the petition to craft a fair procedure, I have concluded that such an effort would result in precisely the "diminishing returns" discussed above. In other words, this case would likely reach a point where the caution in *Boffo* would be engaged, i.e. that a process that looks too much like a trial should simply be a trial. For example, the hybrid procedure would perhaps require the cross-examination of seven separate witnesses.

[66] I also fear the potential for further litigation regarding the precise parameters of any hybrid procedure. As pointed out in *Phaneuf* at para. 73, a hybrid process runs the risk of fostering a lack of certainty about the applicable procedures, leading to the need for many interim determinations.

The Case Law Spectrum

[67] While the case law respects the culture shift towards summary procedures directed by our Court of Appeal in *Cepuran* and the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 at para. 2, there are limits required by fairness and efficiency.

[68] As noted, several courts have determined that where a disputed oral agreement is foundational to the claim, cross-examination on affidavits is often insufficient to resolve the related credibility issues: *Phaneuf* at paras. 70-74*; Shergill* at paras. 33-34*; Taj Park* at paras. 55-56*;* and *Capital Now Inc.* at paras. 93-94.

[69] Gaps in the evidence were found to justify conversion in *Han*. Here, gaps include the full details regarding the Three Lots project, among other things.

[70] I find myself in the same situation as Justice Skolrood in *Taj Park*, where the Court noted that the agreement at issue was not clearly drafted and had "a number of uncertainties and ambiguities in the clauses relied on by both parties," which required "ascertaining the parties' intentions" with respect to certain crucial clauses in dispute and for which "the surrounding circumstances or factual matrix are thus of considerable relevance in this case": para. 52, 54.

[71] Given that the language of the Incorporation Documents provides so little assistance in resolving the Disputes, I find that this case is similar to *Taj Park* in that:

> [51] The ultimate goal in interpreting a written contract is to give effect to the intentions of the parties. In some cases, the words used will be so clear and unambiguous, that resort to the surrounding factual matrix will be largely unnecessary. In other cases, where the written instrument is unclear or ambiguous, the evidence of the surrounding circumstances will be more important in illuminating the parties' intentions.

[72] This case bears the greatest factual parallel with the situation facing the Court in *Phaneuf*, where the Court converted the matter to an action for many of the same reasons identified above. That case also involved an attempt to add oral terms on top of existing incorporation documents.

[73] On the other hand, I find that this case is distinguishable from *Chandra* in that it cannot "largely be dealt with through documentary evidence": para. 28. Unlike *Chandra,* this is not a case where it will be enough to consider what the parties internally "believed," but rather it will turn more upon what they were "told": *Chandra*, para. 28. The facts are also distinguishable from *Horseshoe Valley*. There, the criminal interest rate issue could be adequately addressed by allowing the parties to exchange expert evidence and conduct cross-examinations on that evidence. The issue of improvident realization could be addressed by allowing the parties to exchange affidavit evidence and conduct cross-examination on the key elements. Here, more is needed because the parties dispute the terms of an oral agreement, and credibility will be a critical issue.

[74] Finally, this case has far more disputes that must be resolved; *Chandra* and *Horseshoe Valley* engaged far fewer: paras. 6 and 12, respectively.

IV. CONCLUSION

[75] This matter shall be referred to the trial list, beginning with the petitioner preparing a comprehensive Notice of Civil Claim.

[76] If the parties are unable to agree on costs within the next 30 days, the parties shall provide written briefs on the issue on the following schedule:

a) Ms. Du: no more than 40 days from today;

b) NGLD: no more than 50 days from today;

c) Ms. Du's Reply: no more than 60 days from today.

"The Honourable Mr. Justice Branch"