IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *WB Cape International Limited v. Liquid Media Group Ltd.,* 2023 BCSC 1792

Date: 20230901
Docket: S233254
Registry: Vancouver

Between:

WB Cape International Limited, Diamond Platinum Holdings Limited and DNA Capital Ltd.

Petitioners

And

Liquid Media Group Ltd.

Respondent

Before: The Honourable Justice Wilkinson

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	E. Aitken
Counsel for the Respondent:	O. Hanson S. Bogetti
Place and Date of Hearing:	Vancouver, B.C. August 22, 24 & 25, 2023
Place and Date of Judgment:	Vancouver, B.C. September 1, 2023

[1] **THE COURT:** These are my reasons for judgment on the application of the petitioners.

Introduction

[2] The petitioners seek injunctive relief against the respondent under s. 227(3) of the *Business Corporations Act,* S.B.C. 2002, c. 57 [BCA] in the nature of an interim order as follows:

a) Restraining and enjoining the respondent Liquid Media Group Ltd. ("Liquid Media"), its directors and officers, and anyone else having notice of the order, from:

(i) appointing any individual to, or permitting any individual to remain on, the board of directors of Digital Cinema Utd. Holding Limited ("DCU") unless that individual is one of Barend Buitendag, Alan Christensen, Ron Thomson, Joshua Jackson and Andy Wilson; and

(ii) constituting, or permitting remain constituted, a board of directors of DCU that does not include both of Barend Buitendag and Alan Christensen.

Background

[3] The petitioners are shareholders of Liquid Media, a publicly traded British Columbia company listed on the NASDAQ. Liquid Media is a holding company with several operating subsidiaries in the digital cinema and streaming space, including its 100% owned subsidiary DCU. DCU is a Maltese company providing technical content services for theatrical, home entertainment and digital distribution platforms.

[4] The petitioners explain the relief sought as ensuring that Liquid Media maintains DCU's board of directors as set out in a securities exchange agreement made between the parties in February 2022 (the “SEA”).

[5] Pursuant to the SEA, Liquid Media acquired DCU from its prior owners: the petitioners WB Cape International Limited ("WB Cape") and DNA Capital Ltd. ("DNA Capital"). WB Cape's and DNA Capital's sole compensation under the SEA was an agreed number of shares of Liquid Media, paid contingent upon DCU achieving certain revenue thresholds.

[6] Liquid Media acquired 100% of the shares in DCU under the SEA. As such, DCU is a wholly owned subsidiary of Liquid Media.

[7] The SEA provided that Liquid Media would issue WB Cape and DNA Capital three million Liquid Media shares on closing, with additional shares to be issued to WB Cape and DNA Capital upon DCU achieving certain revenue targets after closing.

[8] The first trigger for the issuance of additional Liquid Media shares to WB Cape and DNA Capital, described as the "First Milepost" in the SEA, is DCU revenue following completion of the acquisition in excess of USD $4,750,000 as determined in accordance with International Financial Reporting Standards (“IFRS”), which was defined as Canadian GAP in the SEA.

[9] The second trigger for the issuance of additional Liquid Media shares to WB Cape and DNA Capital, the "Second Milepost", is DCU revenue received following achievement of the First Milepost in excess of USD$10,287,000.

[10] Another term of the SEA provided that Liquid Media would make funding available to DCU for general working capital.

[11] Under the terms of the SEA set out in Article 3.1, DCU's board of directors would consist of certain named individuals until the earlier of five years or DCU achieving the Second Milepost.

[12] The named directors of DCU are Barend Buitendag (who is WB Cape's principal), Alan Christensen (who was DNA Capital's principal and is DCU's current CEO), Joshua Jackson (Liquid Media's interim CEO), and Ron Thomson and Andy

Wilson, who were in management positions at Liquid Media. In effect, WB Cape and DNA Capital each had a board appointee or representative and Liquid Media had three seats on the board.

[13] Liquid Media issued the three million shares to WB Cape and DNA Capital on closing of the SEA, on March 8, 2022 and WB Cape and DNA Capital transferred their shares in DCU to Liquid Media. The petitioner Diamond Platinum holds WB Cape's pro rata portion of Liquid Media shares in trust for WB Cape.

[14] The petitioners claim that Liquid Media has failed to meet its obligations under the SEA by failing to issue shares owing under the First Milepost provision which they claim was met on February 28, 2023, failing to provide funding, and changing the constitution of DCU's board of directors in contravention of Article 3.1.

[15] Liquid Media takes the position that the First Milepost has not been confirmed since an audit is required to ascertain whether the revenue target has actually been met. They also take the position that Liquid Media has funded DCU under the SEA a total of approximately USD $1.8 million until August, 2022. Since DCU was cash flow neutral by September 2021, Liquid Media submits it was under no obligation to finance DCU after that date.

[16] Mr. Thomson's management of Liquid Media as CEO was apparently unsatisfactory to the board of Liquid Media. He resigned his position of CEO of Liquid Media and director of DCU on June 3, 2022. On June 28, 2022, Mr. Jackson was appointed interim CEO of Liquid Media.

[17] In July 2022, Mr. Wilson resigned his position with Liquid Media which required him to also resign from the board of DCU.

[18] Ms. Sheri Rempel was appointed by the board of Liquid Media as interim CFO of Liquid Media, under an external recruitment. In October 2022, Liquid Media appointed Ms. Rempel, as a director of DCU.

[19] In early January 2023, the DCU board suspended Mr. Buitendag from his director's position with pay pending an investigation into allegations of sexual harassment. On January 10, 2023, the board of Liquid Media on behalf of Liquid Media resolved to remove Mr. Buitendag from the board of DCU.

[20] Mr. Buitendag vigorously challenged the sexual harassment allegations and the actions of the Liquid Media and DCU boards. He did express his willingness to cooperate with an appointed investigator. Recent communications to Mr. Jackson in August 2023 appear to threaten violence.

[21] On January 26, 2023, Mr. Buitendag personally commenced litigation proceedings in Malta seeking to enjoin DCU from removing him as a director. He relied in part, on the provisions of the SEA, particularly section 3.1. On March 13, 2023, the Maltese Court ruled against Mr. Buitendag.

[22] Following the ruling of the Maltese Court, on March 24, 2023, the DCU board held an extraordinary board meeting at which it dismissed Mr. Buitendag from his role as director in accordance with the resolution of the board of Liquid Media. At the same time, the DCU board also terminated Ms. Geraldine Noel from her role as Corporate Secretary of DCU. In their opinion, Ms. Noel had been assisting Mr. Buitendag in taking legal action against DCU and the Liquid Media board which they considered to be a conflict of interest. Mr. Jackson assumed the role of Corporate Secretary of DCU. In March 2023, Liquid Media also appointed Mike Devine as a director of DCU.

[23] On May 2, 2023, Mr. Buitendag sought a second injunction in the Maltese court against Liquid Media as the sole shareholder of DCU, to prevent Liquid Media from disposing of its shares of DCU, among other things, pending a claim by Mr. Buitendag for damages related to his suspension and removal from the DCU board. This application was denied on June 21, 2023.

[24] On July 26, 2023, Mr. Buitendag sought a third injunction in the Maltese court against DCU from holding a board meeting or proceeding with any director's

resolutions, pending the outcome of the interim injunction application before this Court and/or until the board of DCU is comprised of Messrs. Buitendag, Christensen, Wilson, Thomson and Jackson. On August 3, 2023, the Maltese Court again denied Mr. Buitendag's request for an injunction.

The history of the proceedings in This Court

[25] On April 28, 2023, the petitioners filed their petition seeking, among other things, a declaration that the affairs of Liquid Media have been conducted in an oppressive manner. The petitioners further applied, with notice to Liquid Media, for injunctive relief to prevent Liquid Media from proceeding with a shareholder's meeting then scheduled for May 5, 2023. Liquid Media chose to take no position and did not appear on the application.

[26] On May 3, 2023, Madam Justice Tucker granted an interim order restraining and enjoining Liquid Media from proceeding with the special meeting of shareholders. She further enjoined Liquid Media from proceeding with any matters requiring a special resolution.

[27] WB Cape and DNA Capital have also commenced a separate lawsuit against Liquid Media and several of its current and former officers and directors for damages associated with Liquid Media's breaches of the SEA. No response to civil claim has yet been filed.

[28] On July 25, 2023, the petitioners filed an amended petition in this proceeding, seeking interim and final orders pursuant to s. 227(3) of the BCA (i) enjoining Liquid Media from having any individual on the DCU board except those permitted under the SEA, and (ii) requiring Liquid Media to maintain Mr. Buitendag and Mr. Christensen as directors of DCU.

Preliminary objection of Liquid Media

[29] Liquid Media submits the application should be dismissed because the petitioners seek relief against non-parties to these proceedings, none of whom have been provided formal notice of these proceedings, including DCU, Mr. Thomson, Mr.

Wilson, Ms. Rempel or Mr. Levine. Further, in the case of Mr. Thomson and Mr. Wilson there is no evidence that they consent to be a director of DCU or that they are willing to assume all of the risks and liabilities associated with such a position.

[30] It is clear form the record before me that DCU, Ms. Rempel and Mr. Levine have received actual notice of the proceedings and application. As well, the petitioners have amended the form of order sought so that it does not require any of these individuals to take action or in the case of Mr. Wilson and Mr. Thompson, to accept an appointment and act as a director of DCU.

[31] This submission therefore lacks merit.

The test for injunctive relief under the BCA

[32] The petitioners' injunction application is grounded in a claim under the oppression remedy pursuant to s. 227 of the BCA. The test for an interim order in respect of an oppression remedy is generally the same as the test applied to an interlocutory injunction: *Mclsaac v. David*, 2019 BCSC 931 at para. 44.

[33] That test is well-established as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [RJR] and *British Columbia (Attorney General) v. Wale,* [1986] B.C.J. No. 1395 (C.A.). For an injunction to issue, an applicant must demonstrate:

a) there exists a serious issue to be tried;

b) that irreparable harm will result if the relief is not granted; and

c) that the balance of convenience favours granting the injunction.

Is there a serious issue to be tried?

[34] A serious question to be tried is one that is not frivolous or vexatious. An applicant does not have to demonstrate it will finally succeed on the merits. The threshold is low: *RJR* at 337-38.

[35] Where the injunctive relief sought is properly characterized as mandatory, rather than prohibitive, an applicant must demonstrate that it has a "strong prima facie case" rather than merely the existence of a serious issue to be tried. Demonstrating a strong prima facie case entails showing a strong likelihood that, at the hearing on the merits, the applicant will ultimately be successful in proving the allegations set out in the originating notice: *R v. Canadian Broadcasting Corp*., 2018 SCC 5 [CBC] at para. 17.

[36] In so confirming, the Court acknowledged that the distinction between mandatory and prohibitive injunctions can be difficult. The court must look past the form and the language in which the order sought is framed and identify the substance of what is being sought, in the circumstances, and consider the practical consequences of the injunction: *CBC* at para.16.

[37] While the petitioners refer me to the discussion regarding limited application of the stringent test in *Canivate Growing Systems Ltd. v Brazier*, 2019 BCSC 899, the Court of Appeal, in *Este v Esteghamat-Ardakani,* 2020 BCCA 202 recently reaffirmed the principle that all mandatory injunctions require the applicants to meet the more stringent injunction test, as set out in CBC:

> [36] A mandatory interlocutory injunction, compelling a person to take a positive action, sets the test higher. Rather than requiring a "serious question to be tried", a mandatory interlocutory injunction requires that the applicant establish a "strong prima facie case": *R. v. Canadian Broadcasting Corp*., 2018 SCC 5. In CBC Justice Brown explained at para. 18:
>
> > [18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR -- MacDonald test*, which proceeds as follows:
> >
> > > (1) The applicant must demonstrate a strong prima facie case that it will succeed at trial. This entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
> > >
> > > (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
> > >
> > > (3) The applicant must show that the balance of convenience favours granting the injunction.

> [37] The judge acknowledged the CBC test but then, referring to *Carnivate Growing Systems Ltd. v. Brazier,* 2019 BCSC 899, which restricted the application of the more stringent test to cases in which the effect of the mandatory injunction is tantamount to a final judgment, applied the lesser test of a serious issue to be tried. In my view, that approach is inconsistent with CBC and is not correct. In applying this lesser standard applicable to a common injunction restraining behaviour, the judge erred in law.

[38] Therefore, the question is whether the overall effect of the injunction sought is to require the respondent to do something, or to refrain from doing something?

Is the injunction sought mandatory or prohibitive?

[39] The petitioners characterise the injunction as prohibitive. They submit that the injunction would restrain Liquid Media from depriving Mr. Buitendag of his right to sit on DCU's board and from allowing other non-permitted individuals to sit on DCU's board.

[40] However, the petitioners seek an order which seeks to require Liquid Media to also make appointments to the Board of DCU. Ultimately, the effect of the order sought is that Liquid Media must take certain actions in order to restore the composition of the board of DCU to its composition as it last existed in June, 2022. That was the first instance of a change in the DCU board since the closing of the SEA. The composition of the board changed again in July 2022, again in October 2022, and finally in March 2023.

[41] Given the fact that the petitioners recognise the court cannot order a person to accept an appointment or otherwise act as a director, the composition of the board they seek pending resolution of the petition, is to cause Mr. Buitendag and Mr. Christensen to be the two remaining board members.

[42] In my opinion, the overall effect of the injunction sought is to cause Liquid Media to take action. One cannot say that the petitioners seek to return the situation to that of the status quo given the multiple changes in the composition of the board over the time since the closing. The injunction sought is mandatory in nature.

[43] If I am in error on that front, I will also apply the less stringent test on the basis that the injunction might actually be prohibitive.

If the injunction is mandatory, have the petitioners established a strong prima facie case for the oppression claim?

[44] Under this standard, the Court must conduct an extensive review of the merits of the claim and the petitioners must show "a strong likelihood on the law and evidence presented" that, at the final petition hearing, they will be "ultimately successful" in proving the allegations set out in their application: *CBC* at para 17.

[45] For my purposes, it is not the merits of the entire claim that are at issue, it is only the existence of the right which the petitioners allege is being breached absent the issuance of the injunction.

[46] The Court's power to relieve against the consequences of oppressive conduct is broadly described in ss. 227(2)(a) and (b):

> (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.

[47] The two inquiry test for an oppression claim is set out in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, at para. 69:

a) Does the evidence support the reasonable expectation asserted by the claimant? and

b) 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”?

[48] Among the factors considered to determine reasonable expectations, courts look to 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* at para. 72

[49] The petitioners refer me to *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd*., 2016 BCCA 258 at para. 50, in which the Court of Appeal commented on conduct which has commonly been found to constitute oppression, quoting from Kevin P. McGuinness in *Canadian Business Corporations Law* (2nd ed., 2007) as follows:

> ... It is also oppressive for a controlling shareholder or director to orchestrate the business or affairs of a corporation (e.g., by making discretionary or unjustified payments) to frustrate or circumvent his or her obligations under a contract ...
>
> The classic case of oppression arises where the complainant has effectively been denied the very benefit he or she sought to obtain when joining the corporation in the capacity of a director, officer, or shareholder or when investing in it as a security holder.

[50] The petitioners also refer me to *Lyall v. 147250 Canada Ltd.,* 1993 CanLII 481 (BCCA), where the Court of Appeal considered the terms of a unanimous shareholder agreement which afforded each shareholder a degree of control. It was held that the complainant shareholder and director was entitled to expect that the other shareholders and directors would comply with the provisions of that shareholder agreement. The actions of the defendants, in repudiating the agreement and effecting a fundamental change in the purpose of the corporation, were found to be unfairly prejudicial. They also refer me to *Moon v. Golden Bear Mining Ltd*., 2012 BCSC 829, at paras. 273-314.

[51] They submit that here, as in *Lyall* and *Moon*, the petitioners expected that, in agreeing under the SEA to give up their ownership of the shares of DCU and tie their compensation to shares in Liquid Media as well as DCU's ongoing performance, they would maintain a measure of control over DCU's ongoing performance by in effect having two of five seats on the board of DCU.

[52] They further submit that removing Mr. Buitendag as a director of DCU, appointing Ms. Rempel and Mr. Devine as directors of DCU, and more recently taking steps detrimental to the interests of DCU by way of DCU Board decisions which the petitioners disagree with, is oppressive and unfairly prejudicial to the interests of the petitioners.

[53] The defendant submits the oppression claim suffers from four problems.

[54] First, they submit British Columbia is not the proper forum for the determination of the remedy sought by the petitioners. This court does not have subject matter jurisdiction to grant relief affecting the internal management and affairs of DCU which is a Maltese company: *Gould v. Western Coal Corporation*, 2012 ONSC 5184, at paras. 327-330.

[55] Matters of internal management of a corporation and questions affecting its status are to be determined by the courts of the corporation's domicile: *Incorporated Broadcasters Ltd. v Canwest Gobal Communications Corp*., [2001] O.J. No. 4882, at paras. 94-96; *National Trust Company Limited v. Ebro Irrigation & Power Co*mpany Limited et al, [1954] O.J. No. 545 (S.C.), at para. 39.

[56] The petitioners submit they are not seeking relief against DCU. It is the BC company, Liquid Media against which it seeks relief. They submit the essential relationships at play in this case grounding the reasonable expectations related to DCU's board are between Liquid Media, which sets DCU's board, and Liquid Media's largest shareholders WB Cape and DNA Capital, who they submit have reasonable expectations that Liquid Media will appoint only certain designated individuals to DCU's board. Those expectations are embedded in the SEA an agreement to which both Liquid Media and DCU are parties that is governed by British Columbia law and contains a forum jurisdiction clause in favour of British Columbia.

[57] The defendant obtained an email exchange between Mr. Buitendag and Ms. Noel, the DCU corporate secretary, from September 15, 2022. Ms. Noel wrote to Mr. Buitendag and his personal and WB Cape’s legal counsel regarding the proposed

DCU corporate actions, including steps to appoint Ms. Rempel to the board of DCU. She included the following question:

> @Ben Buitendag can I presume that you do not have an issue with point 5, considering that the directors of Liquid to be appointed to Digital were specified in the SEA agreement?

[58] To which Mr. Buitendag replied the same day:

> Wonderfully set out and agreed.

[59] The petitioners argue this email was obtained by an abuse of the litigation process, since the email was marked "confidential and only for the intended recipients" and as such it should not be admitted. The email was sent by Mr. Buitendag through his DCU corporate email address and to him as a DCU director and executive. Ms. Noel was the DCU corporate secretary but not a DCU employee. She was appointed as corporate secretary by way of retainer with Liquid Media. I cannot see how DCU, in now obtaining the email by way of search authorized by DCU board resolution and in accordance with corporate legal counsel's advice, and then sharing it with Liquid Media, is somehow either an invasion of Mr. Buitendag's privacy or abuse of the litigation process. The exhibit is admissible on this application.

[60] Mr. Buitendag addresses this email in his recent affidavit. He explains the emails as dealing with Liquid Media's funding obligations and steps to take to secure that funding for the benefit of WB Cape and DCU. He does not address the fact that he apparently agreed to the appointment of Ms. Rempel to the DCU board, without objection.

[61] This email provides some support for the defendant's position that the parties to the SEA understood that the general make-up of the DCU board was numerically in favour of Liquid Media appointments and that replacement appointments could be made, despite the mandatory wording in the SEA.

[62] In addition, as framed by the petitioners, there is an appearance that the focus of the petitioners is on the internal affairs of DCU. The issue is not necessarily

who is on the board, but what action the board members have taken. The substance of the expectations of the petitioners are set out as:

a) They expected that they would maintain a measure of control over DCU's ongoing performance;

b) Liquid Media's actions are contrary to their reasonably held expectations by taking steps detrimental to the interests of DCU;

c) Liquid Media's conduct has deprived the petitioners of their ability to control the direction of DCU and their contracted for ability to oversee the affairs of DCU; and

d) Mr. Christensen is unable to block any director's resolutions given DCU's Articles require only a majority vote thereby depriving the petitioners of their contracted for ability to oversee the affairs of DCU which will cause significant and permanent harm to their interests.

[63] There is some merit to the defendant’s position that the true concern of the petitioners is the interference with their expectations as board members in the management and operation of DCU, and not as shareholders of Liquid Media or parties to the SEA.

[64] Therefore I cannot say that the petitioners have a prima facie claim for relief by way of jurisdiction under the BCA.

[65] The defendant’s second objection is that the petitioners' expectations in respect of the constitution of the DCU board are contractual in nature. They submit the expectations did not arise by reason of their role as shareholders of Liquid Media, and accordingly, are not protected by the oppression remedy.

[66] It is not appropriate for the court to invoke the oppression remedy as a substitute for an ordinary right in contract*: Bruner v. MGX Minerals Inc*, 2019 BCSC 11 at paras. 69-77. Where a complaint is purely contractual in nature, "the terms of the contract should be looked to for a remedy": *Bruner* at para. 76.

[67] The oppression remedy is not available to a party aggrieved by an imprudent or improvident bargain, thus seizing on an equitable remedy not contemplated by the parties: *Shefsky v. California Gold Mining Inc*., 2016 ABCA 103, at paras 74-75.

[68] Where the claimant already has a clear remedy in contract, tort, or debt the court is unlikely to grant a remedy under s. 227: *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.,* 2016 BCCA 258 at para. 53

[69] The petitioners submit their claim is based on their rights as shareholders with specific rights attaching to their shares. The respondent submits the petitioners' alleged expectations arise not as a result of their position as Liquid Media shareholders, but from promises allegedly afforded to them, under the negotiated terms of the SEA, in their capacity as vendors of DCU shares.

[70] The respondent has a good argument to make here. The petitioners' agreement with Liquid Media is a multi-party agreement, including DCU. It is not a shareholder agreement amongst all shareholders of Liquid Media (as was the case in *Lyall* and *Moon*). It is also time limited, based on the performance of DCU or simply the passage of time. Ultimately it is an agreement which spans a transition period, enabling the petitioners to acquire additional shares in Liquid Media and thus an increased payment in exchange for the transfer of their shares in DCU.

[71] For this reason, I do not find that the petitioners have a strong prima facie case with regard to the reasonable expectation held by the petitioners as shareholders of Liquid Media as opposed to expectations held only or substantially as parties to a contract. Those types of claim would be personal not subject to relief on an equitable basis.

[72] Third, the respondent submits the petitioners' alleged expectations regarding the constitution of the DCU board are unreasonable in any event. The concept of reasonable expectations is objective and contextual. Further, the actual expression of a particular stakeholder is not necessarily conclusive.

[73] Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. Conflicts may arise between the interests of corporate stakeholders and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen: *BCE* at para 82.

[74] Directors may find themselves in a situation where it is impossible to please all stakeholders. The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction: BCE at para 84.

[75] Here, the petitioners argue that the DCU board must be constituted in the manner contemplated by section 3.1 of the SEA with no exceptions. This expectation ignores the fiduciary responsibilities of Liquid Media's board, as the majority shareholder of DCU, to ensure that DCU is compliant with its Articles, as well as Maltese corporate law, if one of the initial board appointees resigns, refuses or was unable to act as a director of DCU, or if one of them acted in a manner contrary to the best interests of DCU or otherwise acted in breach of their fiduciary duties and had to be removed. It ignores the interests of all other shareholders of Liquid Media that are not parties to the SEA.

[76] The respondent submits such an expectation is not reasonable. Even if reasonable, 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.

[77] Mr. Wilson and Mr. Thomson, both Liquid Media representatives, resigned from the DCU board. Mr. Buitendag was removed, which Liquid Media says was as a result of, amongst other things, allegations of sexual harassment with respect to

DCU staff and a client, his personal attacks and accusations aimed at Mr. Jackson and Ms. Rempel (which I note from recent correspondence appears to continue), and his refusal to recognize the authority of the board and management of DCU.

[78] Based on these circumstances I do not find that the petitioners have a strong prima facie case with respect to their reasonable expectations that the board would only be comprised of the individuals set out in Article 3.1 no matter what transpired over the five year period.

[79] Fourth, the respondent submits the petitioners' claim for oppression is an abuse of this court's process as a form of collateral attack on the decisions rendered by the Maltese Court and the parallel Notice of Civil Claim filed in this court.

[80] This submission has little to no merit. The Maltese actions were taken by Mr. Buitendag in his personal capacity as a director of DCU. He is not a party to this petition. As well, the plaintiffs in the NOCC do not seek the same relief as in the oppression petition. They could not does so given the procedural rules applicable to s. 277 claims being required to be brought by petition. The relief sought is different in each BC proceeding. I see nothing improper in how the petitioners have proceeded.

[81] On the whole, however, the petitioners have not shown a strong prima facie case.

If the injunction is prohibitive, have the petitioners established a serious question to be tried?

[82] If the injunction is prohibitive, have the petitioners established a serious question to be tried? This is not a high hurdle. As set out above with regard to the claims, I do find that the petitioners have established a serious question to be tried. The petition is not bound to fail, vexatious or frivolous.

Will irreparable harm result if the relief is not granted?

[83] RJR, at 341 sets out that "irreparable" refers to the nature of the harm suffered rather than its magnitude:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. Crain Inc. v. Hendry (1988), 1988 CanLII 5042 (SK KB), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (American Cyanamid, supra) ...

[84] The petitioners submit that Article 3.1, which they argue has been breached by Liquid Media, is a negative covenant. As such injunctive relief may be granted without great consideration of irreparable harm: *Li* v*. Rao,* 2019 BCCA 264, at paras. 66-67. I fail to see how Article 3.1 is a negative convent in that it somehow expressly prevents Liquid Media form taking some action. It does not.

[85] The petitioners refer me to *Blackmore Management Inc. v. Carmanah Management Corporation*, 2022 BCCA 159 at para. 27 for the proposition that conduct which will affect an applicant's ability to control the direction of a company has been held to constitute irreparable harm. *Blackmore* involved a dispute arising in a three-shareholder closely held corporation, where two shareholders sought an application to stay an order of the Court of Appeal pending further appeal. On the evidence, there was a risk that Blackmore (the third shareholder) would exercise shotgun rights to become the sole shareholder of the company, thus revoking any ability the other shareholders would have to protect the control they sought to recover in the litigation. Further, the court was satisfied "from the evidence before it" that there was a "real risk" in the company defaulting on existing commitments and damaging customer relationships. That is not the case here.

[86] The petitioners also refer me to *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021 BCCA 387 at para. 15 for the proposition that interference with a business can give rise to irreparable harm in a variety of ways including through economic impact on operations, preventing or limiting a business' operations, and potential unemployment and loss of workers.

[87] The petitioners cite Liquid Media's conduct as depriving WB Cape and DNA Capital of the ability to control the direction of DCU. They further cite Liquid Media’s

withholding further share issuance. This is not a decision of the board members of DCU so I am at a loss as to how that harm relates to the board composition of DCU. They point to harm demonstrated by Liquid Media's recent conduct at the helm of DCU through board composition changes There is no evidence of harm caused to the petitioners by reason of those appointments and actions taken by DCU.

[88] DCU is operating. There is no evidence before me to indicate that the decisions made by the board have been and are continuing to harm DCU. The petitioners simply allege that bad decisions are being made. However, the evidence is that when the board was comprised of the five initial appointees, Mr. Buitendag often disagreed with other board members, and ultimately the decision of the majority of board members. It does not appear as if the removal of Mr. Buitendag has changed the ultimate direction of the company.

[89] The petitioners provide no evidence of harm which could not be compensated by way of damages. In the NOCC the petitioners seek damages for breach of Article 3.1 of the SEA.

[90] The petitioners have not shown that failure to provide injunctive relief will cause them irreparable harm.

Does the balance of convenience favour granting the injunction?

[91] The third step of the test, balance of convenience, involves a determination of which of the parties will suffer the greater harm from the granting or refusal of the interlocutory order, pending a decision on the merits: *RJR* at 342.

[92] The petitioners submit that the granting of the injunction will simply hold Liquid Media to the terms of the SEA, an agreement for which it freely bargained and by which it agreed to be bound. In contrast, absent injunctive relief the petitioners will suffer harm. They have not established a strong *prima facie* in the cause of action of oppression. However, they have established that there is a serious issue to be tried.

[93] Even if the petitioners are ultimately successful at trial, it does appear that damages would be an adequate remedy for any harm suffered if their petition is granted on my review of the record.

[94] I agree with the respondent that in any event, the granting of the injunction and reconstituting the DCU board to the form sought by the petitioners would be significantly inconvenient, for all affected parties including CDU, Liquid Media and its shareholders. Given Mr. Buitendag's past and recent conduct, an order requiring his reinstatement to the DCU board would likely cause disharmony and increased hostility between the parties: *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835; *Kainth v. Newton Whalley Hi Way Taxi Ltd*., 2023 BCSC 844, at para. 38

[95] The balance of convenience does not favour granting the injunction.

Conclusion

[96] Based on my findings above and on an overall consideration of the circumstances of this case I decline to exercise my discretion to order the injunctive relief sought. The application is dismissed.

Costs

[SUBMISSIONS ON COSTS]

[97] Costs are to the respondent in event of the cause. Thank you, counsel.

"Wilkinson J."