IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tchoubarov v. Poseidon Fishing Inc.,* 2023 BCSC 1448

Date: 20230721
Docket: S2013580
Registry: Vancouver

Between:

Yanina Kononova, Project Pacific Holdings Ltd., Relaize Co. and DV-Building Group Co.

Plaintiffs

And

Oleg Anatoliy Tchoubarov, Sea Green Enterprises Ltd., Poseidon Fishing Inc., Aurora Fishing Co. Ltd., Northern Fjord Equipment Corp. and John Kitchen

Defendants

- and -

Docket: S2110176
Registry: Vancouver

Between:

Yanina Kononova and Project Pacific Holdings Ltd.

Petitioners

And

Poseidon Fishing Inc., Oleg Anatoliy Tchoubarov and Aurora Fishing Co. Inc.

Respondents

- and -

Docket: S221695
Registry: Vancouver

Between:

Oleg Anatoliy Tchoubarov and Aurora Fishing Co. Inc.
Petitioners

And

Poseidon Fishing Inc., Yanina Kononova and Project Pacific Holdings Ltd.
Respondents

Before: The Honourable Madam Justice Wilkinson

Oral Reasons for Judgment

(In Chambers)

Counsel for: DV-Building Group Co., Yanina Kononova, Project Pacific Holdings Ltd., Relaize Co.:	S. Batkin A. Moore
Counsel for Aurora Fishing Co. Ltd., Northern Fjord Equipment Corp. Sea Green Enterprises Ltd., Oleg Tchoubarov:	M.D. Carter
No other appearances	
Place and Date of Hearing:	Vancouver, B.C. July 5-7, 2023
Place and Date of Judgment:	Vancouver, B.C. July 21, 2023

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

[2] The plaintiffs seek orders striking the responses to civil claim and judgment in Action No. S2013580, (the “Conspiracy Action") against certain defendants as a result of the conduct of those defendants. The petitioners seek to strike the response to petition of the same defendants and ancillary relief pursuant to the *Business Corporations Act,* SBC 2002, c 57 *[BCA]* with a Mareva injunction in Petition No. S2110176, (the "Kononova Oppression Petition") based on the conduct of the defendants.

[3] The same defendants and respondents in the Conspiracy Action and Kononova Oppression Petition seek orders against the plaintiffs and petitioners as respondents in the defendants' petition for orders pursuant to the oppression remedy provisions of the *BCA* in Petition No. S221695, (the "Tchoubarov Oppression Petition"). They also seek the relief sought in the Tchoubarov Oppression Petition on the hearing of the petition.

[4] For the reasons that follow, I grant substantially all of the relief sought by the plaintiffs and petitioners in the Conspiracy Action and Kononova Oppression Petition. The Tchoubarov Oppression Petition and related application is dismissed.

Background

[5] Poseidon Fishing Inc. (“Poseidon”) is a commercial fishing (crabbing) company. Its main assets are:

a) a commercial fishing vessel called the Winsum. It was gutted by fire on August 31, 2021. The insurer wrote it off and paid out the claim in May 2022. The proceeds were used to pay down Poseidon's credit facilities at RBC;

b) a commercial crab fishing licence, (the “Licence") associated with Winsum, which allows for fishing with 1,000 traps; and

c) all traps and appurtenances (the “Winsum Traps”) related to the business.

[6] Yanina Kononova is one of the two directors of Poseidon, and her wholly owned company Project Pacific Holdings Ltd. ("PPH"), is a 49% shareholder of Poseidon.

[7] Ms. Kononova is a businesswoman who resides in Vladivostok, Russia. She is the director and owner of two Russian companies, DV-Building Group Co.("DVBG") and Relaize Co. ("Relaize").

[8] Mr. Tchoubarov is the other director of Poseidon, and his wholly owned company Aurora Fishing Co. Ltd. (“Aurora”), is a 51% shareholder of Poseidon. He resides in North Vancouver.

[9] The purchase of the Winsum, the Licence, and the Winsum Traps by Poseidon was funded by term loans, ("Kononova Loans") made by Ms. Kononova through her companies in the amount of USD $1,320,000 to Poseidon and USD $30,000 to Mr. Tchoubarov's company, Sea Green Enterprises Ltd. (“Sea Green”). These loans have not been repaid.

[10] Pursuant to a shareholders' agreement dated April 21, 2018 (the “Shareholder Agreement”), all important decisions of Poseidon must be made unanimously by Mr. Tchoubarov and Ms. Kononova, including as set out in clause 3.07:

> a) Any financial expenditure, commitment or transaction out of the ordinary course of business of the Company;
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> b) Any borrowing by the Company;
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> c) The guarantee by the Company of the debts of any other person or corporation;
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> …
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> e) Any contract between the Company and any Shareholder or an affiliate of any of its Shareholders;

f) The sale, lease, transfer, mortgage, pledge, or other disposition of all or substantially all of the undertaking of the Company;

h) Any contract or agreement material to the Company's business operations or performance.

[11] Mr. Tchoubarov is also an owner and controlling mind of the following companies:

a) Sea Green, of which he and his wife are directors, which owns two fishing vessels:

i. “Val Don 1” (Val Don”), together with an associated commercial crab fishing licence, which was purchased in 2017 or 2018; and

ii. “Katrina Lesley 1” (KL1”), which was purchased by Mr. Tchoubarov in September 2021, and which does not have an associated commercial fishing licence.

b) Northern Fjord, incorporated in December 2018. John Kitchen confirmed that Mr. Tchoubarov appointed John Kitchen as the sole director to conceal his involvement in that company; and

c) Vantage West, of which Mr. Tchoubarov is a director. Vantage West owned the fishing vessel “Prosperity 1” and an associated commercial crab fishing licence for 600 traps.

The History of the Litigation

[12] The Conspiracy Action was commenced on December 21, 2020, against Mr. Tchoubarov, Aurora, Sea Green, and Northern Fjord (collectively, the "Tchoubarov Defendants"), Mr. Kitchen and Poseidon. As pleaded in the amended notice of civil claim filed April 28, 2022, the plaintiffs claim:

a) for breach of contract against Poseidon and Sea Green for failing to repay the Kononova Loans; and

b) for conspiracy, fraudulent misrepresentation, conversion, and misappropriation of funds, breaches of and assistance in breaches of fiduciary duty, and breaches of the Shareholder Agreement against the Tchoubarov Defendants, as well as Mr. Kitchen.

[13] Ms. Kononova and her company PPH filed the Kononova Oppression Petition on November 25, 2021. They seek declarations that the affairs of Poseidon have been conducted, and Mr. Tchoubarov exercised his powers as a director, in a manner oppressive to them and breached ss. 46, 142, 147, 148 and 196 of the BCA and relief from oppression.

[14] The Tchoubarov Oppression Petition was filed March 2, 2022 seeking leave to commence a derivative action on behalf of Poseidon against Ms. Kononova and PPH, and a declaration that Ms. Kononova has exercised her powers as a director of Poseidon in a manner oppressive to them, and breached ss. 142, 147, and 148 of the BCA.

[15] There have been a number of court applications and orders in these proceedings as well as a settlement agreement.

The Kononova Applications

[16] The Kononova applications arise from the Tchoubarov Defendants' alleged conduct with regard to the court's process and breaches of court orders.

[17] The applicants submit this conduct is as follows:

a) Failure to follow the *Rules of Court* by thrice failing to attend scheduled examinations for discovery on November 30 and December 1, 2021, on April 4 and 5, 2022, and on December 7 and 8, 2022, including after being warned that this application would follow in the event of a third non-appearance.

b) Failure to comply with the document-production order made by Master Taylor on November 4, 2021 (the “Production Order”). In breach of this order, the Tchoubarov Defendants have failed to produce, inter alia, documents showing the use of the funds they allegedly misappropriated from Poseidon. c) Failure to comply with an injunction granted by Justice Gomery on November 29, 2021, (the “Traps Injunction”), which required the Tchoubarov Defendants, “at their own cost and expense, without prejudice to a final determination and accounting as among the parties to the proceeding, Sea Green and Vantage West”, to remove the Winsum Traps from the water. Mr. Tchoubarov is said to have thrice breached this injunction by taking, without Ms. Kononova's knowledge and consent, approximately $300,000 from Poseidon for reimbursement for expenses purportedly incurred in removing the Winsum Traps from the water, including payment to Sea Green.

c) Failure to comply with an injunction granted by Justice Tammen on December 17, 2021, (the “Expense Injunctiton”), which enjoined Mr. Tchoubarov from using Poseidon's credit card, required Ms. Kononova's written consent for all Poseidon expenses, and required Mr. Tchoubarov to provide, by January 17, 2022, supporting documents for all expenses he had charged to Poseidon, directly or indirectly, including by “reimbursement” to his Sea Green and Vantage West.. Mr. Tchoubarov allegedly breached this Injunction by:

i. failing to provide the required records;

ii. charging $64,000 on Poseidon's credit card in 58 transactions, including almost $17,000 paid for legal fees; and

iii. withdrawing $178,001.27 from Poseidon's account in 35 transactions without Ms. Kononova's consent.

d) Failing to comply with Standstill Order issued by the court as a result of failure to comply with the terms of a settlement agreement reached between the parties made effective July 11, 2022 (the "Settlement Agreement"). A consent order entered November 4, 2022 (the Standstill Order") froze Poseidon's operations and assets, including its bank accounts and the licence, and prohibited any use of same without the express written consent of the Plaintiffs. In breach of the Standstill Order, the Tchoubarov Defendants secretly continued Poseidon's operations and secretly continued to use Poseidon's assets, including the Licence, its funds, and the revenue generated from the Licence.

[18] As of the beginning of the hearing of these matters, on July 5, 2023, the Tchoubarov Defendants did not deny most of the above-noted breaches.

[19] On June 27, 2023, the Tchoubarov Defendants' counsel delivered 20 groups of receipts from 2020 and 2021 without explanation. On June 30, 2023, a further 16 groupings were delivered for 2020 and 2022. Although provided without any explanation, it appears that this was a very belated attempt to comply with the disclosure requirements of the Expenses Injunction.

[20] These documents come almost 1.5 years after the court-ordered deadline for production, with no explanation for the delay. Moreover, they confirm and prove the Tchoubarov Defendants' breaches of the Traps Injunction, the Expenses Injunction, and the Standstill Order, by way of unauthorized use of Poseidon's funds.

[21] Even with the late document production, compliance with the production order is incomplete.

[22] Mr. Tchoubarov submitted late affidavits, which I admitted into evidence, including one submitted on the third and last day of the hearing. It was in that last affidavit in which he expressly admits that he has caused the defendants to breach the court orders. He expresses no remorse. Neither does he apologize for this conduct. Throughout the proceedings, he attributes his conduct to being a response

to Ms. Kononova's physical absence from British Columbia and what he submits is her unfamiliarity with what the business of Poseidon requires.

[23] Mr. Tchoubarov now, only well after the examinations for discovery were set by agreed upon appointment, provides explanations for his non-attendance, saying he is willing to attend at a new appointment date. No reason is provided for failure to explain his non-attendance in a timely manner.

[24] Further, there is evidence of oppressive conduct toward the interests of Poseidon by failing to adhere to the Shareholder Agreement and treating Poseidon as Mr. Tchoubarov's own entity to do with as he wishes without disclosing conflicts of interest and reaching agreement with the other director. He treats Poseidon as if it is his wholly owned venture, and groups it in with Sea Green and Vantage West. This includes his authorization of Poseidon to provide a guarantee to Vantage West for a $900,000 loan from RBC in order to secure financing for the purchase of the Prosperity I. The credit card evidence indicates continued use of credit facilities for Poseidon while under court order not to without consent of the Kosonova plaintiffs/petitioners.

[25] Mr. Tchoubarov does not attempt to address the clearly questionable expenses charged to Poseidon. For example, an expense for a spa, flights to California, regular subscriptions to television and music services. He simply states he does not have copies of the receipts associated with the expenses which are with the accountant.

[26] Even before the parties started operating Poseidon, the evidence shows that Mr. Tchoubarov placed his own interests above Poseidon's. Just before Poseidon purchased Winsum and its Licence, he arranged for the boat to be purchased by Northern Fjord, which he then directed to be flipped to Poseidon for approximately $600,000 more. This required Poseidon to obtain approximately $600,000 in bank financing over Ms. Kononova's investment in order to pay for the Winsum and License.

[27] Mr. Tchoubarov states that Ms. Kononova knew of this arrangement and that this increase was payment to him in compensation for the rate of interest, (7%) that Ms. Kononova was charging on her loan to Poseidon. Ms. Kononova denies this and it makes no sense whatsoever that Ms. Kononova would agree to Poseidon taking on additional debt as well as compensating Mr. Tchoubarov to such an extraordinary extent. Also, strangely, Mr. Tchoubarov now claims that the fact Ms. Kononova charged a commercial rate of interest on her shareholders' loan was a conflict of interest.

[28] This is just one example of Mr. Tchoubarov's nonsensical or otherwise implausible explanations of his actions, in instances where he actually provides a rationale. In another example, he explains that he “reimbursed” Sea Green and others for removing the traps but only after the Settlement Agreement was reached. As such, he takes the position that all of the litigation was settled at that time, and therefore the Gomery Order was no longer an obstacle for Poseidon making that payment. This flies in the face of the terms of the Settlement Agreement. The litigation would be fully resolved only when the terms of the Settlement Agreement had been fully complied with and expired. That never happened, hence the Standstill Order being put in place.

[29] Ever since Ms. Kononova returned to Russia in 2019, Mr. Tchoubarov has decided that she is in effect no longer entitled to be consulted with respect to the operation of Poseidon and operated it as if it was his personal business. That is not his unilateral choice.

[30] Ms. Kononova did not return to Canada as usual in the spring of 2020. I note that at that time the COVID-19 pandemic was impacting the ability of people around the world to travel. Subsequently, in February 2022 the Russo-Ukrainian War escalated.

Legal Basis

Striking Defences for Non-Compliance with the Rules and Court Orders

[31] Rules 22-7(2), (5) and (6) of the *Supreme Court Civil Rules* provide that the court may strike out a response to civil claim or a petition response where the defendant or petition respondent has failed to comply with the *Rules*, produce documents or attend discovery, or abide by court orders.

[32] A helpful summary of the jurisprudence dealing with dismissal applications made pursuant to Rule 22-7 is set out in *Breberin v. Santos*, 2013 BCSC 560. Principles relevant to the application before me are as follows:

> [52] Several principles identified in the jurisprudence describe and limit the appropriate application of Rule 22-7.
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> [53] The order sought by the defendants is not readily granted. Dismissal is a "blunt tool, to be used sparingly" in response to procedural delay: *House of Sga'nisim v. Canada (Attorney General)*, 2007 BCCA 483 at para. 28 [*House of Sga'nisim*]. The remedy is a "draconian" one, "only to be invoked in the most egregious of cases": *Homer Estate v. Eurocopter S.A.*, 2003 BCCA 229 at para. 4. It is to be avoided where it is reasonable to do so: *House of Sga'nisim* at para. 30.
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> [54] Where failure to comply with the Rules or failure to comply with the terms of a court order is established, the party at fault bears the onus of proving a lawful excuse for the non-compliance or non-observance: *Balaj v. Xiaogang*, 2012 BCSC 231 at para. 36 [*Balaj*]; *Eisele v. B.A. Blacktop Ltd.*, 2004 BCSC 521 at para. 15.
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> …
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> [57] Fundamental failures, such as failure to make appropriate disclosure of documents or records, must be treated as a serious default.
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> [58] A dismissal order will not usually be granted on a first application for relief arising from procedural delay, even intentional delay. Injustice might result from such a course of action.
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> [59] A dismissal order will not usually be granted until the plaintiff has been warned that result will follow upon further delay or obstruction.
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> [60] Lesser sanctions ought to be considered where any are available and appropriate.
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> [62] A persistent pattern of delay on the part of the plaintiff, as well as a persistent failure to comply with the Rules of Court and court orders, may result in a dismissal order. Defaults must be seen in context. The plaintiff's

> conduct of the claim from its inception does have a bearing on the seriousness of the default before the court.
>
> [63] When persistent conduct prevents the litigation from progressing at all, and when trial dates are lost through deliberate defaults, the failures may have an irreparable negative effect on the just determination of a case. Failing to comply with an order in a manner that causes an adjournment of trial is seriously prejudicial to the defendants.
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> [64] Refusal to comply with an order for reasons raised before the court and rejected amounts to an overt and deliberate flouting of the court order: *Balaj*; *House of Sga'nisim*; *Dhillon v. Pannu*, 2008 BCCA 514; *Kemp v. Dickson*, 2006 BCSC 288.

[33] The overarching principle requires that the Court consider whether, in all of the circumstances, justice requires that the defence be struck: *Schwarzinger v. Bramwell*, 2011 BCSC 304, at para 107.

[34] In *Grewal v. Nijjer*, 2011 BCSC 332, at para 31, the court has struck out a statement of defence and a counterclaim due to the defendants' failure to comply with a Master's order for production of documents, particulars of their defence, and an affidavit verifying their list of documents. The court summarised the rationale behind the Rule as follows:

> [20] It is not up to litigants to decide whether or when they will obey court orders, or whether they will only comply with some of them. Court orders must be complied with. Otherwise, the administration of justice falls into disrepute, significant costs are incurred by parties attempting to enforce compliance, and delay results. This cannot be tolerated. If a party is unable to comply with a court order, the Rules of Court provide the opportunity to seek a variation.

[35] On appeal in *Grewal v. Nijjer*, 2011 BCCA 505, Justice Donald dismissed the appeal and confirmed that striking pleadings is a reasonable remedy where a breach of a court order is deliberate and the respondent has no intention of complying with court orders:

> [16] … Without any prospect of compliance, it cannot be said, as counsel for the Nijjers submitted, that Mr. Grewal was not seriously prejudiced by the Nijjers' conduct.

[36] In *519981 B.C. Ltd. v. Schimert*, 2015 BCSC 2607, Justice Gaul applied these principles, striking a defence for non-compliance with orders, as follows:

> [35] …The plaintiffs have not sought to vary any of the orders that have been made in this case and I find they have made little or no effort to address my order of September 2015. I will add that there is nothing before me to suggest that the plaintiffs are prepared to change their ways. In my opinion, the plaintiffs have wilfully attempted to stymie the defendants' efforts to have them particularize their claims.

[37] As Justice Fitzpatrick explained in *Schwarzinger* at paras 141 -144, that there comes a time when enough is enough, and the only meaningful remedy to the aggrieved party is the striking of pleadings.

[38] The Tchoubarov Defendants submit they should be given a “second chance”. I do not agree that this is only their second chance for compliance. However, the principle of providing a second chance becomes moot where the respondent has no intention to comply with court orders, as found in *Grewal*, or where multiple court orders have been breached, establishing a pattern of non-compliance, as explained in *XY, LLC v. Canadian Topsires Selection Inc.*, 2015 BCSC 912:

> [100] The Application Defendants seek the "second chance" that is certainly a potential result here, as opposed to the more severe remedy of striking the responses to civil claim: *Schwarzinger* at paras. 113-117. In *Consorcio*, that second chance was granted, even in the face of a previous court order, although it was accompanied by an adequate excuse for non-compliance.
>
> [101] However, it can hardly be suggested that this would be a "second" chance. There has now been non-compliance with not one, but two court orders, being the Case Management Order and the May 2014 Order. This non-compliance has been persistent from the start of this litigation, which is now three years gone. Given the Application Defendants' insistence, in April 2012, that they be allowed to inspect the hard drives before XY, this can hardly be described as an oversight. It is also hard to understand how the Application Defendants could not have understood the continuing importance of doing so, given the persistent and detailed demands given by XY’s counsel on the point throughout the course of this litigation.

[39] Failure to attend an examination for discovery is also treated seriously, particularly because the Appointment expressly warns of the consequences,

including striking of a defence. Coupled with other breaches, a failure to attend discovery may result in the dismissal on a claim or defence of the first dismissal application: *Reddy v. Element Fleet Management Inc.*, 2015 BCSC 465 at paras 39 and 42.

[40] The above principles are readily applicable in this case, as the Tchoubarov Defendants have:

a) failed to produce documents pursuant to Rule 7-1(1), despite numerous demands and the agreement communicated by counsel to produce documents.

b) failed to comply with the Production Order , even after these breaches were:

   i. specifically in the Plaintiff's response to the Licence Transfer Application, their response to Mr. Tchoubarov's application for security for costs, and their response to the Tchoubarov summary judgment application; and

   ii. were relied on by Justice Mayer as one of the reasons for dismissing the summary judgment application.

c) Mr. Tchoubarov has not complied with two orders of this Court requiring him to produce documents that may show how the Misappropriated Funds were used.

d) Mr. Tchoubarov failed to attend examinations for discovery three times, with the third failure coming after the first two were noted by Justice Mayer on May 6, 2022 as one of the reasons for dismissing the Tchoubarov summary judgment application, and plaintiff's counsel expressly warned that a further failure to attend would result in an application to strike.

e) Breached the Traps Injunction by taking approximately $300,000 from Poseidon in purported compensation for the costs of removing the

Winsum Traps out of the water. I note that this was prioritized by the defendants over the payments owing under the settlement agreement.

f) Breached the Expenses Injunction by:

i. failing to provide supporting documents for any and all expenses charged by Mr. Tchoubarov to Poseidon;

ii. charging $64,496.18 on Poseidon's credit card in 58 transactions including almost $17,000 in payment of the Tchoubarov Defendants' legal fees; and

iii. withdrawing $178,001 from Poseidon's account in 35 transactions without Ms. Kononova's consent. Mr. Tchoubarov continued to breach the Expenses Injunction, use Poseidon's credit card, and take money from Poseidon's accounts even after being repeatedly put on notice by the Plaintiffs, and convinced the bank to unfreeze Poseidon's accounts to allow him to continue this misconduct;

g) Breached the Standstill Order by:

i. using Poseidon's funds after November 4, 2022; and

ii. cancelling the Licence Reversion, continuing to use the Licence with KL1, and it appears diverting the revenue owed to Poseidon.

[41] The Tchoubarov Defendants at the last hour, admit to breaching the court orders. However, no apology or remorse is offered.

[42] It is clear to me that the Tchoubarov Defendants have no intention of complying with the *Rules* or court orders, and the only appropriate remedy in the circumstances is to strike out their defences in the Conspiracy Action and the Kononova Oppression Petition.

Proceeding to Judgment in the Conspiracy Action

[43] Where a defence is struck out under Rule 22-7, the defendant is generally deemed to have admitted the allegations of fact contained in the statement of claim, and the plaintiff is entitled to obtain a judgment as if on default for a liquidated amount or for damages to be assessed: *The Law Society of British Columbia v. Gill*, 2016 BCSC 2237, at paras 22 to 23; *Wisan v. Bountiful Elementary-Secondary School Society*, 2018 BCSC 356, at paras 64 and 67.

[44] Accordingly, the plaintiffs are entitled to judgment. They seek judgment for monetary amounts and damages to be assessed.

Proceeding to Judgment in the Kononova Oppression Petition

[45] Where a petition response is struck out under Rule 22-7, the matter proceeds as if no petition response had been filed: *Morgan v. Thompson*, 2013 BCCA 329, at paras 6 - 7.

[46] Section 227(2) of the *BCA* provides that a shareholder may apply for a court order where the affairs of the company are being conducted in an oppressive manner, as follows:

> (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] PPH is a shareholder of Poseidon, holding 49% of its shares.

[48] The two part test for shareholder oppression was elucidated in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, at para 68, as follows:

a) the court must consider the reasonable expectations of the shareholder and whether these expectations were breached; and

b) if a breach is established, the court must then consider whether the conduct complained of amounts to “oppression”, “unfair prejudice”, or “unfair disregard”, a set out in the governing corporate statute.

[49] Reasonable expectations are highly contextual:

> [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.

[50] In determining the expectations of the shareholder, and whether they were reasonable, the court may consider general commercial practice, the nature of the corporation, the size of the corporation, the relationship between the parties, past practice, steps the claimant could have taken to protect itself, the content of representations and agreements, and the fair resolution of conflicts in accordance with the best interest of the corporation: *BCE* at paras 72 - 84.

[51] Central to this matter are the basic and reasonable shareholder expectations that Mr. Tchoubarov would:

a) act in accordance with his fiduciary duties as a director of Poseidon, his duties of good faith and honesty including to generally act in the best interest of Poseidon, including prudent and transparent use of its assets or revenues, and not seeking to profit unilaterally at Poseidon and PPH's expense;

b) act in accordance with his statutory duties as a director of Poseidon, including his obligations with respect to disclosable interests in ss. 147 and 148 of the *BCA*, and his obligations to provide access to all records to the other director of Poseidon under s. 196 of the BCA;

c) act in accordance with the Shareholders' Agreement, including:

i. clause 3.03, providing that PPH would “have full access to all corporate records of the company at all times, Including without limitation all accounting, bank records and financial statement”; and

ii. clause 3.07, providing that matters and transactions could not be undertaken without the approval of PPH's nominee, director Ms. Kononova, as set out above; and

d) would comply with court orders related to the operation of Poseidon, in particular the Traps Injunction, the Expenses Injunction, and the Standstill Order.

[52] Mr. Tchoubarov has breached these reasonable expectations in a manner that is unfairly prejudicial and unfairly disregards PPH's interests. The test for shareholder oppression has been readily met in this case, and PPH is entitled to the relief as sought.

Remedial Orders Under s. 227(3) of the BCA

[53] Pursuant to s. 227(3) of the *BCA*, on an application under s. 227(2) the court may, with a view to remedying or bringing an end to the matters complained of, make any interim or final order it considers appropriate, including any of the orders outlined therein.

[54] *Multiguide GmbH v. Broer*, 2022 BCSC 852, 2023 BCCA 134, provides a useful summary of the court's broad remedial powers under s. 227(3):

> [195]…oppression is an equitable remedy which seeks to ensure fairness. Pursuant to s. 227(3) of the *BCA*, the court has broad remedial authority when it determines that the claimant has established either oppression or unfairly prejudicial conduct has occurred. Determining an appropriate remedy requires a flexible and discretionary approach: *Wilson* at para. 57. The authorities establish at least four general principles that should guide the courts in fashioning a fit remedy, including in determining whether an order of personal liability against the directors is "fit" in all of the circumstances:

> a) the remedy requested must be a fair way of dealing with the situation;
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> b) the order should go no further than is necessary to rectify the oppressive conduct;
>
> c) the order should only serve to vindicate the reasonable expectations of shareholders, creditors, directors or officers in their capacity as corporate stakeholders, and not in any personal capacity; and
>
> d) the court should consider the general corporate law context when exercising its remedial discretion.

[196] A remedy for oppressive conduct is available to address the objective and substantive reality of the conduct of the affairs of a company. As set out in *Canex*:

> [13] Several observations may assist in structuring the analytical framework to be brought to bear in assessing whether a remedy is available for oppressive conduct. It is not limited by mere formalities of corporate structure. What matters is substance, not form. Hence, courts are entitled to examine the realities of how a company is controlled and by whom, and the trust nature of relationships within and between related companies. Doing so does not displace the importance of legal structures and corporate law principles which inform the analysis. This is the approach the judge took in this case, and rightly so. The judge was entitled to look past corporate formalities to determine who truly controlled the Company, and who benefited from the transactions that were impugned in these proceedings: *BCE* at para. 58. The judge's finding of liability against the personal defendants was rooted in this approach, and does not reflect an error in principle.
>
> The court is entitled to look past corporate formalities (but not ignore the legal principles of corporate law) to determine who controlled the company and who benefited from the impugned transactions: *Canex* at paras. 13, 69; *BCE* at para. 58. The remedy should bring an end to the conduct complained of, but should go no further than necessary to correct the injustice of unfairness between the parties: *Wilson* at para. 27; *63833 Manitoba Corp. v. Cosman's Furniture (1972) Ltd.*, 2018 MBCA 72 at paras. 43-47.

[197] Further, the authorities establish that in certain circumstances personal orders against directors are appropriate: *Wilson* at paras. 32-33. These circumstances include where directors: Obtain a personal benefit from their conduct; have increased their control of the corporation by the oppressive conduct; have breached a personal duty they have as directors; have misused a corporate power; or where a remedy against the corporation would prejudice other security holders. They may also include cases involving closely held corporations where a director has virtually total control

> over the corporation: *Wilson* at paras. 32-33. Some of these cases "have involved small, closely held corporations, where the director whose conduct was attached has been the sole controlling owner of the corporation and its sole and directing mind; and where the conduct in question has redounded directly to the benefit of that person": *Pitney Bowes of Canada Ltd. v. Belmonte*, 2011 ONSC 3755 at para. 28 [Pitney]; citing *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.*, 1995 CanLII 7419 (Ont. S.C.J. (Gen. Div.)), 131 DLR (4th) 399, at para. 22. The focus is on the fairness of the remedy in the circumstances. The court must consider whether the oppressive conduct is properly attributed to the individual director, and whether the imposition of liability is "fit in all of the circumstances": *Wilson* at paras. 47-50. The remedy crafted should be commensurate "with rectifying the breach of the plaintiffs' reasonable expectations": *Canex* at para. 78.

[55] The crux of oppression in this case is that Mr. Tchoubarov has been running Poseidon as his personal proprietorship to the exclusion of Ms. Kononova and PPH. He has been using the assets of Poseidon, its cash, its revenues, and the Licence as if they were his, Sea Green's, and Vantage West's assets, which has resulted in very significant harm to the petitioners.

[56] The finances of Poseidon and its cash flows became completely opaque to the petitioners save and except for the recent disclosures, which indicates misappropriation of Poseidon's funds and resources on a significant scale by Mr. Tchoubarov and Sea Green. To get to the bottom of this, with a view to equitable compensation, a forensic accounting needs to be undertaken.

[57] The Licence is Poseidon's sole remaining substantial asset, given the fact that the Winsum has been written off, and insurance proceeds for it have been received and used to pay down Poseidon's RBC credit facilities. As well the fate of the Winsum Traps and other equipment is unknown.

[58] Mr. Tchoubarov has refused to sell the Licence because he wants to use it with KL1, which does not have its own commercial fishing licence. However, that enables him to continue using it in a manner that is opaque and unfair to the petitioners. He submits that the transfer to KL1 should be temporary to permit repairs to be done to the Winsum so it can return to crabbing under her own Licence. Mr. Tchoubarov estimates this will cost up to $500,000. He provides no independent evidence to support this evaluation. He does not suggest how that cost

would be financed other than through the revenue share Poseidon would be owed by his own company through Licence fees or catch share.

[59] I find that the Licence should be sold for fair market value, which appears to be worth at least $1 million at this time, the sale process should be controlled by the Kosonova petitioners and approved by the court, and Mr. Tchoubarov may have an opportunity to purchase the Licence in this process.

[60] Finally, I will direct that Aurora buy PPH's shares in Poseidon at their fair market value as of a date to be directed by the court, and subject to further directions of the court that may arise as a result of the implementation of the above orders.

Mareva Injunction

[61] A Mareva injunction is an equitable remedy that freezes a party's assets, restraining a defendant from removing, dissipating or disposing of its assets before the applicant can obtain or enforce judgment: *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420, at paras 3- 4.

[62] A Mareva injunction may continue pending assessment of costs and enforcement of judgment: *Le Soleil Hospitality Inc. v. Louie*, 2015 BCSC 2372 at para 44.

[63] The basic premise of a Mareva injunction is that the defendant is a rogue bent on flouting the process of the court, which justifies the exceptional and drastic measure of freezing the Defendant's assets before trial and before judgment: S*abourin and Sun Group of Companies v. Laiken*, 2013 ONCA 530, at para 53, aff'd sub nom. *Carey v. Laiken,* 2015 SCC 17.

[64] The general approach to Mareva injunctions in British Columbia differs from those in other jurisdictions, as explained by the court of appeal in *Kepis*:

> [18] In sum, British Columbia has forged a flexible approach to applications for Mareva injunctions from the more stringent rules-based approach in *Aetna*. Under this approach, ["the fundamental question in each

> case is whether the granting of an injunction is just and equitable in all the circumstances of the case": *Mooney v. Orr* No. 2 at para. 43. The legal test requires an applicant to establish:
>
> > (1) the threshold issue of a strong *prima facie* or good arguable case; and
> >
> > (2) in balancing the interests of the parties, to consider all the relevant factors, including
> >
> > > (i) the existence of exigible assets by the defendant both inside and outside the jurisdiction, and
> > >
> > > (ii) whether there is evidence of a real risk of disposal or dissipation of those assets that would impede the enforcement of any favourable judgment to the plaintiff.

[65] While risk of disposal or dissipation of assets is a relevant factor in the analysis, it is not a prerequisite for the issuance of a Mareva injunction: *Shakeri-Saleh v. Estate of Ahmadi-Niri*, 2022 BCSC 700:

> [14] While avoiding the dissipation of assets is the objective, in some cases, a Mareva injunction will be granted without evidence of active disposal of assets, or that the defendant had a dishonest intent in disposing of the assets, or a risk of the defendant moving assets with the intent to defeat or evade judgment: *Hans v. Volvo Trucks North America Inc*., 2014 BCSC 1123 at para. 74; *Fernandes* at para. 10, citing Blue Horizon Energy Inc. at paras. 16, 24-30.

[66] Furthermore, in cases involving serious fraud, as in this case, the risk that assets will be dissipated may be inferred from the evidence when a plaintiff has established a strong *prima facie* case. To determine whether there is such a risk, the court must look at the circumstances, including the nature of the conduct alleged and the type of assets involved: *United States Securities and Exchange Commission v. Sharp*, 2023 BCSC 425 at paras 90 - 94.

Strong Prima Facie Case

[67] In striking the response to petition, and on the evidence, there is no doubt that the petitioners have a strong *prima facie* case.

Balancing of the Parties' Interests

[68] "Irreparable" refers to the nature of the harm suffered, one which either cannot be quantified in monetary terms, cannot be cured, or would be difficult to compensate in damages. Examples include situations where a party will (i) be put out of business, (ii) suffer permanent market loss, (iii) suffer irrevocable damages to its business reputation, or (iv) suffer permanent loss of natural resources: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para 59 .

[69] Harm cannot be cured, and is thus irreparable, when the plaintiff will not be able to collect damages from the defendant see: *Winking Judge Pub Ltd. v. Donnelly Hospitality*, 2019 BCSC 336 at para 52.

[70] An applicant need only demonstrate that it may suffer irreparable harm because there is doubt that damages would provide an adequate remedy should it succeed at trial. Clear proof of irreparable harm is not required: *Wale v. British Columbia (Attorney General)*, [1991] 1 S.C.R. 62 at paras 47 and 50; and *Winking Judge* at para 52.

[71] Apparent dishonesty on the part of the defendants, such as dishonest dealing with corporate property without authority, or obtaining property by false pretenses, supports the conclusion that irreparable harm to the owner of the property will result: *O'Connell v. Mazilescu*, 2011 BCSC 732 at paras28-31.

[72] The balance of convenience portion of the test for an interlocutory injunction requires the court to assess which of the two parties will suffer greater harm from the granting or refusal of the injunction, pending a decision on the merits s: *RJR-MacDonald* at para. 67.

[73] There is no question in my opinion, on the evidence, and particularly the Tchoubarov Defendants' persistent flouting of court orders that, and Mr. Tchoubarov's secret pledging of Poseidon's assets for his personal benefit, that his conduct throughout has been deliberately harmful to Poseidon and the petitioners.

[74] The only significant asset of value remaining in Poseidon is the Licence. Even if it is sold, the amount left to Poseidon is likely to be less than is owed to the petitioners under their loans.

[75] Poseidon is the owner of the Licence, but Mr. Tchoubarov has shown no reluctance to deal with that asset without Ms. Kononova's knowledge and consent and in breach of court orders.

[76] With respect to evidence concerning the ability to satisfy any judgment that may be granted against the defendants, in Mr. Tchoubarov's application to cancel the certificate of pending litigation on his personal real estate, Justice Mayer found in his reasons indexed at 2022 BCSC 736:

> [19] There is evidence which suggests that Mr. Tchoubarov and Sea Green may not have the ability to satisfy a judgment including, for example, the following:
>
> a. On March 23, 2021, Rona Inc. Initiated a small claims action against Mr. Tchoubarov and Sea Green seeking $6,295.98 for purchases of construction materials; and
>
> b. Mr. Tchoubarov continues to carry a second mortgage on the Capilano Road Property, paying $8.99 percent interest, claiming only to make substantial interestonly payments. There is no evidence that he has sought lending from a commercial lender at lower rates despite apparently having a significant amount of equity in the property.

[77] That evidence is in the record before me. Given the additional recent disclosure, I see no reason to find that Mr. Tchoubarov has the intention to satisfy a judgment in the amount of $750,000 or more at this time without the security an injunction would provide.

[78] Vantage West recently sold Prosperity 1 for $2.6M, realizing an apparent profit of $650,000 or more. There was no evidence provided as to how any proceeds were handled. Sea Green is the owner of the KL1 and the Val Don 1, however, there is nothing stopping Mr. Tchoubarov from selling these assets. The location and use of the revenue taken by Mr. Tchoubarov from Poseidon is also not disclosed.

[79] In the balancing of the interests between the parties, it is clear that the injunction sought by the petitioners against the Tchoubarov Defendants is just and equitable in all the circumstances, and granting it will protect the interests of Poseidon from the continuing harm of the Tchoubarov Defendants' misconduct.

[80] The prejudice that the Kononova petitioners will suffer if the requested injunction is not granted outweighs the possible prejudice that would be suffered by the Tchoubarov Defendants if the injunction is granted. If the injunction is not granted, Mr. Tchoubarov and his controlled companies are likely to continue to flout the existing orders made against them, and protect their interests over that of Poseidon.

Changes to the Model Mareva Order

[81] The Mareva injunction model order will incorporate the changes as requested by the petitioners in order to provide the minimum intrusion into the ordinary and reasonable business operations of the Tchoubarov Defendants.

The Tchoubarov Oppression Petition

[82] The petition brought by the Tchoubarov Defendants is based on allegations that Ms. Kononova directly and through her holding company PPH engaged in oppressive conduct in her role as director of Poseidon by not providing the services as agreed to in the Shareholders' Agreement, and by blocking Mr. Tchoubarov in his efforts to deal with the Winsum and the Licence.

[83] Based on my findings above, these allegations are unfounded. Ms. Kononova's efforts to confirm the validity and reasonableness of Mr. Tchoubarov efforts with regard to dealing with the Winsum and the license after the fire were reasonable. This is particularly so given Mr. Tchoubarov's questionable conduct at the time.

[84] In addition, Mr. Tchoubarov's conduct renders his request for equitable relief unjust, as he comes to court without clean hands: *Ben 102 Enterprises Ltd. v. Ben*

105 Enterprises Ltd., 2007 BCSC 1069 at para. 55; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.,* [1993] 1 S.C.R. 167 at 188.

[85] The Tchoubarov Oppression Petition is dismissed.

Conclusion

[86] This outcome was perhaps foretold in the name of the venture.

[87] In conclusion, I make the following orders.

[88] With regard to the Conspiracy Action:

a) the amended response to civil claim of the Tchoubarov Defendants and counterclaim is struck.

b) Judgment is granted to the plaintiffs as follows:

i. against Sea Green in the amount of USD $30,000, plus contractual interest of USD $17,781.04 to June 28, 2023, plus contractual interest from June 29, 2023 to the date of judgment;

ii. against Poseidon in the amount of USD $250,000, plus contractual interest of USD $115,044.71 to June 28, 2023, plus contractual interest from June 29, 2023, to the date of judgment;

iii. against Poseidon in the amount of USD $1,070,000, plus contractual interest of USD $481,855.96, plus contractual interest from June 29, 2023 to the date of judgment against Mr. Tchoubarov, Sea Green, and Northern Fjord, jointly and severally, for fraudulent misrepresentation and deceit, misappropriation, and unjust enrichment, with damages to be assessed;

iv. against Mr. Tchoubarov and Aurora, jointly and severally, for breaches of the Shareholders' Agreement, with damages to be assessed; and

v. against the Tchoubarov Defendants jointly and severally, for conspiracy, with damages to be assessed.

c) A tracing of the Misappropriated Funds as defined in the amended notice of civil claim is ordered.

d) A declaration is made that Mr. Tchoubarov holds an interest in the Tchoubarov property, located at 4511 Capilano Road, North Vancouver, British Columbia, and legally described as:

PID:	008-885-541
LEGAL DESCIPTION:	LOT A BLOCKS 3 AND 4, DISTRICT LOT 595 PLAN 12483

as upon a constructive trust for the Plaintiffs, which interest will be determined upon an assessment of damages or, in the alternative by a reference to the Registrar.

e) A declaration is made that Sea Green holds an interest in the FV Val Don 1 upon a constructive trust for the plaintiffs, which interest will be determined upon an assessment of damages or in the alternative, by a reference to the Registrar.

[89] With regard to the Kononova Oppression Petition, I make the following orders:

a) a declaration is made that the affairs of Poseidon have been, and are being conducted in a manner that is oppressive and unfairly prejudicial to the petitioners;

b) Northern Fjord is ordered to repay to Poseidon the sum of $700,000 as the portion of the purchase price paid for the Winsum and Licence which was misappropriated;

c) an order directing Aurora to purchase PPH's shares in Poseidon upon a valuation of PPH's shares without discount or deduction for obligations of Poseidon under the RBC Mortgage and the RBC Line of Credit, and subject to further directions of the court;

d) an order that a forensic accounting be undertaken and report be prepared that will identify:

   i. all revenues received and receivable by Poseidon, including revenues generated from the use of the Licence, Winsum Traps, and other assets of Poseidon, whether used by Poseidon or by other persons, companies, or vessels;

   ii. all expenses paid and payable by Poseidon, including expenses of other persons, vessels or entities;

   iii. all cash flows in Poseidon's credit and debit accounts, including lines of credit and credit cards; and

   iv. all flows of funds between Poseidon and Mr. Tchoubarov, Mr. Kitchen, Sea Green, Vantage West, any other company owned or controlled by Mr. Tchoubarov and any other party.

   For this accounting, the engagement of the accountant is subject to the approval of the petitioners, the accountant will be instructed by the petitioners, and must report to the petitioners and Mr. Tchoubarov and Aurora jointly. Mr. Tchoubarov and the other Tchoubarov Defendants are ordered to cooperate with the accountant, including providing all requested documents, subject only to non-Poseidon claims of privilege. The cost of the forensic report will be borne by Mr. Tchoubarov without prejudice to agreement of the parties in writing or further order of the Court after the forensic report is received.

e) an order that the Kononova Petitioners and their legal counsel are authorized to obtain any and all records or information concerning the Poseidon and its operations from third party record holders, save and except documents that are subject to claims of privilege other than privilege belonging to Poseidon, including:

i. revenues received or receivable;

ii. expenses paid or payable;

iii. transactions with third parties;

iv. Winsum;

v. the Licence; and

vi. the operation of KL1 under the Licence.

The costs of the provision of such records shall be borne by Mr. Tchoubarov and/or Aurora.

f) The Licence will be sold for fair market value with sole conduct of sale at the direction of the petitioners, and approved by the court. Mr. Tchoubarov and any of the Tchoubarov Defendants may have an opportunity to purchase the Licence in this process.

g) Aurora is directed to buy PPH's shares in Poseidon at their fair market value as of a date to be directed by the court without any discount or deduction thereto for the obligations of Poseidon under the RBC Mortgage and the RBC Line of credit.

h) The application for a Mareva injunction is ordered on the terms sought by the petitioners and in the form attached as Schedule “A” to the Notice of Application filed June 9, 2023 subject to agreement of the parties or

further order of the court to ensure minimal intrusion upon the day to day operations of the subjects of the injunction.

[90] The orders are made subject to further directions of the court that may be required as a result of implementation of the above orders.

[91] If the parties cannot agree on the terms for the orders made today including the Mareva injunction order, they may arrange to settle the order before me by contacting trial scheduling.

Costs

[92] I heard limited submissions on costs. The Kosonova plaintiffs and petitioners seek special costs on the applications. I am inclined to make such an order but I will provide an opportunity for additional submissions. The parties may contact Supreme Court Scheduling within 30 days to arrange for an additional one-hour hearing on costs. Otherwise, I award special costs to the petitioners and plaintiffs on the applications, to be assessed.

[93] Anything arising from these reasons counsel?

[94] CNSL S. BATKIN: Very much appreciated. Just one question. You mentioned costs of the applications. What about the costs -- is there an order for the costs of the action?

[95] THE COURT: Yes. That would include costs of the action, given what has transpired in striking responses and the final judgment being rendered. So, yes, that would be costs in the action as well.

[96] CNSL S. BATKIN: Thank you, Justice.

[97] THE COURT: All right, counsel. As I have said, you are free to work between yourselves on terms of the orders, in particular the Mareva injunction, as discussed by counsel at the hearing, and I am prepared to have a hearing to settle the terms of the order if you cannot come to agreement or if there is some dispute on the terms. You can arrange a time with Scheduling.

"Wilkinson, J."